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No. 07-

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois amended a state law to withdraw from one religious group a statutory protection that it continues to offer to all other religious groups in the State. In evaluating a Free Exercise challenge to this law, a divided panel of the Seventh Circuit refused to apply strict scrutiny: It held that the law remained neutral and of general applicability because the State, in treating this religious group differently, was pursuing a secular objective, not a religiously motivated one.

The rule adopted by the Seventh Circuit has been embraced by the First, Fifth, and Ninth Circuits. In contrast, four other Circuits—the Third, Sixth, Tenth, and Eleventh—have held that legislative motivation is irrelevant; a law that singles out religion for unique burdens is categorically not neutral and of general applicability, regardless of whether the law's goals are secular and benign.

The question presented is: Whether the Seventh Circuit correctly held that a law extending a benefit to some religious groups but withholding it from others is neutral and of general applicability simply because "the legislature had [a] nondiscriminatory purpose" in adopting the law.

PARTIES TO THE PROCEEDINGS

Petitioners are St. John's United Church of Christ, Helen Runge, and Shirley Steele. They were plaintiffs in the District Court and appellants before the United States Court of Appeals for the Seventh Circuit.

Respondents are the City of Chicago ("Chicago"), the Federal Aviation Administration ("FAA"), and FAA Acting Administrator Robert A. Sturgell. Chicago, the FAA, and former FAA Administrator Marion C. Blakey were defendants in the District Court and appellees before the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

St. John's United Church of Christ and two of its members, Helen Runge and Shirley Steele (collectively "St. John's"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit affirming the District Court's dismissal of petitioners' Free Exercise claim is reported at 502 F.3d 616 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court is reported at 401 F. Supp. 2d 887 and reprinted at App. 64a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 2007. App. 2a. A timely petition for rehearing and rehearing *en banc* was denied on December 4, 2007. App. 105a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

INTRODUCTION

In *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), this Court held that a law does not offend the Free Exercise Clause so long as it is neutral and generally applicable.

In the 15 years since, the lower courts have divided over a fundamental question: whether a law that singles out religious activity for differential treatment categorically lacks neutrality or general applicability. Four circuits have held that it does. But with the decision below, the Seventh Circuit joins three other circuits that have taken the opposite approach: They have held that a law

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[1] Because their lawsuit challenges the constitutionality of a state statute, petitioners named state officials in their complaint. The State of Illinois, however, moved to dismiss, arguing that Chicago was the proper defendant. The District Court dismissed the State on March 29, 2005. Since then, none of the parties has served the State with any pleadings. Nevertheless, petitioners have served a copy of this Petition on the Attorney General of Illinois. *See* S. Ct. R. 29.4(c).

imposing this sort of differential treatment remains neutral and generally applicable unless the law's object was to target the affected religious activity *because of* its religious nature.

At issue below was the Illinois Religious Freedom Restoration Act ("Illinois RFRA"). As first enacted, the Illinois RFRA provided all religious exercise with across-the-board protection against governmental intrusion. In 2003, however, the legislature amended the Illinois RFRA to withdraw its protections from one religious group: those who worship at religious cemeteries located adjacent to O'Hare International Airport. The legislature stripped RFRA protection from this group because the religious cemeteries supposedly interfered with Chicago's desire to expand O'Hare.

A divided panel of the Seventh Circuit deemed this amendment "neutral," even though it singles out a tiny subset of religious observers, and "generally applicable," even though it leaves the Illinois RFRA's protections applicable to some religious observers but not others. App. 36a. The court so held because it reduced the Free Exercise inquiry to one outcome-determinative question: "whether the object of the [law] was 'to infringe upon or restrict practices because of their religious motivation.'" App. 32a (quoting *Lukumi*, 508 U.S. at 533). Concluding that the legislature was motivated not by religion but by a desire to ease O'Hare's expansion, the court answered in the negative and ended the inquiry.

The panel majority thus embraced a rule that three other circuits—the First, Fifth, and Ninth—have endorsed: Unless the object of a law is to impose special burdens on certain religious groups *because of* religion, strict scrutiny is not triggered. But the

dissenting judge below (Ripple, J.) and four circuits—the Third, Sixth, Tenth, and Eleventh—have taken exactly the opposite approach: They have rejected a motive requirement and held that strict scrutiny applies whenever religious practice is subjected to objectively unequal treatment, even if that unequal treatment "was the means to an entirely secular end." *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006).

This latter approach is the correct reading of *Smith* and *Lukumi*. A statute that objectively treats one religious group differently than all other religious groups categorically lacks neutrality and general applicability and therefore triggers strict scrutiny. To be sure, the *Lukumi* majority suggested that a government motive to burden religion unequally because of its religious nature may be *sufficient* to trigger strict scrutiny, but it did not hold that such a motive inquiry is necessary in cases where religious practice is being subjected to demonstrably unequal treatment. And to clarify matters, Justice Scalia (joined by Justice Thomas) emphasized in *Lukumi* that "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and in the judgment). The rule adopted by the Seventh Circuit rejects that principle. Under the panel majority's approach, the unequal "effects of the laws enacted" will not trigger strict scrutiny unless they are coupled with evidence about the "purposes" animating those laws. *Id.*

The deep division over this issue has not gone unnoticed. Six judges of the Ninth Circuit have recognized "growing confusion among the lower courts" about Free Exercise and predicted that "[i]t is

only a matter of time before the Supreme Court confronts this confusion." *KDM ex rel. WJM* v. *Reedsport School Dist.*, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., joined by Kozinski, Nelson, Kleinfeld, Tashima, and Wardlaw, dissenting from denial of rehearing en banc). Scholars likewise have noted that "confusion abounds in the lower courts, which interpret [*Smith* and *Lukumi*] in significantly divergent ways." Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045, 1046 (2000). The Court should grant certiorari to resolve this entrenched conflict and to provide much-needed clarity on this recurring and important question.

STATEMENT OF THE CASE

A. Facts

1. St. John's is a Christian church established in 1849 in Bensenville, Illinois. That same year, St. John's consecrated St. Johannes Cemetery. The remains of about 1,300 people are buried there.

St. John's is part of the United Church of Christ, a Protestant denomination with nearly two million members in the United States. A central belief of the Church is that on the Day of Resurrection, the bodies of Christian believers will be resurrected to live with God. Church members believe that because God ordained St. Johannes as their loved ones' final resting place, the remains should not be disturbed until judgment day. They believe the salvation of deceased members' souls would be impaired if their remains were removed. The District Court and the Seventh Circuit accepted that Chicago's plan to condemn and destroy the cemetery is a "sacrilege to

[St. John's] religious faith"; the sincerity of that belief is not at issue. App. 31a-32a, 81a.

Among the St. John's members who hold these beliefs are petitioners Helen Runge and Shirley Steele. Ms. Runge, now in her 80s, was baptized, married in, and intends to have her funeral at St. John's. About 25 of Ms. Runge's relatives, including her husband and infant son, are buried at St. Johannes. Ms. Runge visits the cemetery to honor those buried there; she also owns a plot next to her husband, where she intends to be buried. She believes disturbing the graves of her husband and son would be a sacrilege. Likewise, Ms. Steele visits the cemetery to care for and exercise her beliefs at the graves of her grandparents and others.

2. In 2001, Chicago announced a massive expansion plan for O'Hare International Airport. App. 5a. As part of this redevelopment, Chicago decided to acquire 433 acres of land in the Villages of Elk Grove and Bensenville, adjacent to O'Hare. *Id.* 6a. The properties scheduled for condemnation included homes, businesses, and two religious cemeteries—St. Johannes and a cemetery owned by the Rest Haven Cemetery Association ("Rest Haven"). *Id.* St. John's and Rest Haven responded by filing separate suits to block the City's acquisition, with St. John's arguing (among other things) that the City could not destroy the cemetery without violating the Illinois RFRA. The Villages of Bensenville and Elk Grove filed a parallel suit; the state court hearing that suit agreed with the localities' claim that the expansion needed a state permit and granted a preliminary injunction. *Id.* 7a.

Faced with this setback, Chicago turned to the Illinois legislature for relief. The legislature

responded by enacting the O'Hare Modernization Act ("OMA"), which re-wrote more than a dozen laws to remove legal obstacles to O'Hare's expansion. Most pertinent here are two provisions: First, the OMA granted Chicago the power to acquire any property needed for the O'Hare project. App. 8a. Second, the OMA amended the Illinois RFRA to eliminate the protections St. John's had previously enjoyed. Before the OMA's amendment, the Illinois RFRA—like its federal namesake—provided that:

> Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that [the burden] (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

775 Ill. Comp. Stat. § 35/15. But the OMA revoked this across-the-board protection by adding a new Section 30 to the Illinois RFRA: "Nothing in [the Illinois RFRA] limits the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or the graves located therein." *Id.* § 35/30. Section 30, in other words, transformed the Illinois RFRA from a statute that provided strict-scrutiny protection to all religious exercise into a statute that provided that protection to *almost* all religious exercise. The one exception: religious exercise involving cemeteries adjacent to O'Hare. Religious adherents in this category are now excluded from the law's benefits.

B. Proceedings Below

1. In light of Section 30, St. John's state-court Illinois RFRA claim was dismissed as moot. St.

John's, Rest Haven, and the localities responded by filing suit in the United States District Court for the Northern District of Illinois. App. 9a. In a proposed second amended complaint, St. John's[2] noted that absent Section 30, Chicago would be required to meet strict scrutiny under the Illinois RFRA before it could destroy or move St. Johannes. The complaint alleged that Section 30 was unconstitutional under the Free Exercise Clause because it stripped from St. John's members a benefit—RFRA protection—available to all other religious activity in the state.

2. The District Court found the Free Exercise claim to be without merit and therefore rejected the second amended complaint as futile, effectively dismissing it. The court correctly noted that this Court has deemed laws that are " 'neutral and of general applicability' " to pass muster under the Free Exercise Clause. App. 83a (quoting *Lukumi*, 508 U.S. at 531). But rather than analyze the neutrality and general-applicability requirements, the court read *Smith* to mean that "strict scrutiny applies only to laws that discriminate against religion." *Id.* 84a. Continuing in this vein, the court asked only whether Section 30 was intended to burden St. John's religious exercise because of religion. The answer, the court found, was no: There was "no indication in the complaint that the object of the law is to infringe upon or restrict practices *because* of their religious motivation" and Section 30 did not "single out St. Johannes or any other cemetery because of its religious affiliation." *Id.* 84a-85a (emphasis in original). The District Court concluded:

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[2] The Rest Haven relocation had by then been deleted from the O'Hare expansion plan.

"Nothing in the complaint supports the proposition that Chicago wants the St. Johannes land for any reason other than * * * the expansion of O'Hare Airport. Because [there] is no indication that § 30 discriminates against religion, this Court applies rational basis review." *Id.* 86a.

3. On appeal, the Seventh Circuit divided two-to-one, with the majority adopting the same approach as the District Court. The majority accepted that the destruction of St. Johannes would be a sacrilege to church members and would impose a burden on their religious exercise. App. 31a-32a. The majority also acknowledged the "obvious point" that St. Johannes is "the only cemetery in the State of Illinois affected by the new § 30." *Id.* 35a-36a. But it concluded that this differential treatment was not sufficient to state a Free Exercise claim. That was so because St. John's had failed to show something more—that "the object of the OMA was 'to infringe upon or restrict practices *because of* their religious motivation.'" *Id.* 32a (quoting *Lukumi*, 508 U.S. at 533) (emphasis added). Having framed the question this way, the majority found it immaterial that St. John's alone was singled out by Section 30. In fact, precisely because St. John's was the only religious group targeted, the majority was all the more convinced "that the legislature had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion." *Id.* 36a. The majority also found that Section 30 was facially neutral because it did not "'refer[ ] to a religious practice without a secular meaning discernible from the language or context.'" *Id.* 33a (quoting *Lukumi*, 508 U.S. at 533).

The majority, in short, concluded that the government could treat St. John's differently than all

other religious groups in the State, and could thereby impose unique burdens on its members' religious practice, so long as the legislature's underlying motive was unrelated to religion. Because the underlying motive was indeed unrelated to religion, the majority held that "the OMA, including the portion that amends [Illinois RFRA], is a neutral law of general applicability." App. 36a.

This sufficed to dispose of petitioners' claim. The majority nonetheless opined, in dicta, that if strict scrutiny had applied, Section 30 would have satisfied it. Though the task of assessing compelling interest and least-restrictive means is highly fact-bound—and though the case was on appeal from a grant of a motion to dismiss—the majority hypothesized: "Although we think it unnecessary to ask whether the plan passes the strict scrutiny test * * * we add for the sake of completeness that * * * the plan passes muster." App. 36a.

Judge Ripple dissented. He first rejected the majority's conclusion that Section 30 was neutral on its face. Explaining that " '[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from language or context,' " App. 59a (quoting *Lukumi*, 508 U.S. at 533), Judge Ripple concluded that "it is clear that the OMA's amendment to the Illinois RFRA is not facially neutral." *Id.* 59a-60a. He emphasized that the majority's "analysis fails to appreciate that, when read in context," Section 30—an amendment to a law that addressed nothing but religion—had no possible secular referent. *Id.* 60a.

Judge Ripple then turned to the majority's other proposition—that a Free Exercise claim requires not just differential treatment but also a showing that

the government singled out a religious group *because of* religion—and rejected it too. Judge Ripple explained that "[t]he effect of the amendment is to remove from the protections afforded to every other individual's religious observance, those individuals whose religious practices would be substantially burdened by the relocation of cemeteries in connection with the expansion of O'Hare." *Id.* 60a-61a. That unequal treatment was sufficient to trigger strict scrutiny: "The OMA amendment * * * offends the Free Exercise Clause by penalizing those individuals whose religious observance is affected by the expansion project by denying them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.' * * * [S]trict scrutiny must be applied." *Id.* 61a (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)).

Finally, Judge Ripple rebuked the majority for addressing in dicta, and at the motion-to-dismiss stage, how the state's action would have fared under the strict-scrutiny inquiry. He emphasized that the court could not reach the merits of strict scrutiny because "accepting the City's assertions [regarding narrow tailoring] at this stage in the litigation is inconsistent with our obligation * * * to accept all well pleaded facts as true." App. 63a. Since "there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here," Judge Ripple chided the majority for needlessly speculating that Chicago could satisfy strict scrutiny. *Id.*[3]

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[3] Judge Ripple's conclusion was consistent with that of the only judge to actually review the full panoply of evidence and

REASONS FOR GRANTING THE WRIT

I. THE RULING BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT.

The Seventh Circuit's decision deepens an entrenched circuit split on a question federal courts regularly face: whether selectively imposing burdens on certain religious practices is enough to trigger strict scrutiny under the Free Exercise Clause, or whether plaintiffs must also show that the government specifically burdened their religious practice *because of* its religious nature. The Seventh Circuit held that this extra showing is necessary. That same rule has been embraced by the First, Fifth, and Ninth Circuits. In contrast, at least four other circuits—the Third, Sixth, Tenth, and Eleventh—have held just the opposite. This Court should grant the writ to resolve the four-to-four split. *See* S. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we

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consider on the merits whether the O'Hare plan could survive strict scrutiny. In *Village of Bensenville* v. *FAA*, 457 F.3d 52 (D.C. Cir. 2006), the D.C. Circuit denied a petition for review brought by, among others, St. John's, which challenged under federal RFRA the decision by the FAA to approve the O'Hare plan. *Id.* at 68. A majority of the D.C. Circuit held, as a threshold matter, that FAA's approval of Chicago's expansion plan was not governed by federal RFRA. Judge Griffith dissented, concluding that federal RFRA did apply. He therefore went on to apply strict scrutiny and found that the FAA had failed to carry its burden under that exacting standard. Petitioners, he explained, had presented alternative designs that would permit O'Hare's expansion while preserving St. Johannes. *Id.* at 77 (Griffith, J., concurring in part and dissenting in part). Indeed, one of these alternatives involves nothing more than "shifting one runway 350 feet" and would "still achieve the FAA's objectives." *Id.*

use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

A. Four Circuits Hold That Laws Singling Out Religion For Differential Treatment Are Categorically Not Neutral And Generally Applicable.

The decision below squarely conflicts with the decisions of four circuits. These circuits have applied strict scrutiny to laws singling out religious practice for unequal burdens regardless of the government's underlying motivation for imposing those burdens.

The Tenth Circuit. Most recently, the Tenth Circuit so held in *Shrum*, 449 F.3d 1132. *Shrum* concerned a police officer who also worked as a minister. He alleged that the police chief rearranged his work schedule so that it would conflict with his ministerial duties, forcing him to quit his police job. *Id.* at 1134. The allegation was not that the chief had burdened Shrum's religious practice because of its religious nature, but instead that he had done so to achieve an underlying goal unrelated to religion—forcing Shrum to quit the force.

Writing for a unanimous panel, Judge McConnell held that this act triggered strict scrutiny even though the chief's motivation was, at base, secular. "To be sure, Officer Shrum does not allege that Chief Palmer held Officer Shrum's faith against him or acted from religious prejudice," Judge McConnell wrote. "Rather, the claim is that religious discrimination was the means to an entirely secular end: Chief Palmer wanted to force Officer Shrum out, and making him choose between his duties as a police officer and his duties as a minister was the method at hand." *Id.* at 1144. But that fact did not

immunize the chief's action. "[T]he Free Exercise Clause," Judge McConnell wrote,

> is not limited to acts motivated by overt religious hostility or prejudice. As its language suggests, the animating ideal of the constitutional provision is to protect the 'free exercise of religion' from unwarranted governmental inhibition whatever its source. * * * True to this history, the Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities. [*Id.* at 1144-45 (collecting cases) (citations omitted).]

The Tenth Circuit's decision in *Shrum* squarely conflicts with the rule adopted by the Seventh Circuit. In the case below, as in *Shrum*, the government singled out a religious actor for a special burden. The government entities in both cases did so not out of religious hostility, but instead as "the means to an entirely secular end"—airport expansion here and work-force reduction in *Shrum*. The panel below held that because of this "secular reason[ ]," the Illinois law was neutral, generally applicable, and outside the Free Exercise Clause's protection. The case would have come out the other way under the Tenth Circuit's rule.

The majority below denied that its ruling conflicted with *Shrum*. App. 42a. But its attempt to distinguish *Shrum* on its facts misses the point: Unlike the rule the majority adopted, *Shrum* held that laws that treat religious practices differently are

categorically not neutral or generally applicable. Whether the governmental actor was motivated by religious prejudice or animus is simply irrelevant under the Tenth Circuit's decision in *Shrum*. The Tenth Circuit's rule thus squarely conflicts with the decision below, which required plaintiffs to show that the government burdened religious practice *because of* its religious nature.

The Eleventh Circuit. The Eleventh Circuit has adopted the same rule as the Tenth. In *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), plaintiffs challenged a zoning ordinance that excluded religious assemblies from a downtown business district but allowed private clubs. *Id.* at 1219. Applying the *Smith-Lukumi* rubric, the court held that the ordinance was non-neutral: It "target[ed]" religious practice in the sense that it "treat[ed] religious assemblies differently than secular assemblies." *Id.* at 1233. According to the court, strict scrutiny was appropriate even though there was no reason to believe that the differential treatment was motivated by a desire to suppress religious exercise: "We reject Surfside's contention that the [business district] is neutral because there is no evidence of selective and discriminatory intent against Orthodox Jews, a pattern of hostility or discriminatory animus toward the synagogues, or evidence that Surfside directly targeted religion." *Id.* at 1234 n.16. As the court explained, "[u]nder *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law—only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation." *Id.* (citing *Lukumi*, 508 U.S. at 540-542; *id.* at 558 (Scalia, J., concurring in part and concurring in judgment)).

The Eleventh Circuit, in short, understood *Lukumi* to condemn not just the imposition of unequal restrictions on a religious practice *because* it is religious, but also the imposition of unequal restrictions for *any* reason at all. Applying that approach here, the decision below would have come out the other way. For although Section 30 was enacted for secular reasons—to make room for a new runway at O'Hare—it nevertheless targeted one type of religious practice for special treatment. Under the Eleventh Circuit's decision in *Midrash*, that alone would have triggered strict scrutiny.

The Third Circuit. The Third Circuit has aligned itself with the Tenth and Eleventh, most notably in decisions authored by now-Justice Alito. *See Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999).

In *Blackhawk*, the appellant was a Native American who kept bears for religious reasons. State officials demanded that Blackhawk obtain a special permit, and he applied for a waiver, which was denied. *Id.* at 205. Blackhawk sued on Free Exercise grounds, arguing that the waiver process constituted a "system of individualized exemptions" that entitled him to an exemption of his own. *Id.* at 206; *see Smith*, 494 U.S. at 884 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

The Third Circuit, per Judge Alito, agreed that the waiver process at issue created an exemption system sufficient to trigger strict scrutiny. *Id.* at 209. That was so even though there was no evidence that the state had denied Blackhawk's waiver

because of a desire to burden his religious practices. Judge Alito explained why with a quote from his earlier opinion in *Fraternal Order*: "'[T]he * * * exemption raises concern because it indicates that the Department has made a value judgment that secular * * * motivations * * * are important enough to overcome its general interest in uniformity but that religious motivations are not.'" *Id.* at 208 (quoting *Fraternal Order*, 170 F.3d at 366) (alteration in *Blackhawk*). And "'when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.'" *Id.* (quoting *Fraternal Order*, 170 F.3d at 366). *See also Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 165-168 (3d Cir. 2002).

The Third Circuit's decisions in *Fraternal Order* and *Blackhawk* square with those of the Tenth and Eleventh Circuits. As in *Shrum* and *Midrash*, the Third Circuit found Free Exercise violations based solely on unequal treatment. *Blackhawk*, 381 F.3d at 208. The court never paused to ask *why* government had treated religious practice differently—whether the officials involved had disliked the groups at issue, or conversely whether they had had some wholly benign underlying motive. The mere fact that government had engaged in unequal treatment, which inherently "devalues" religious practice, *Fraternal Order*, 170 F.3d at 366, was sufficient to trigger strict scrutiny.

The Sixth Circuit. In *Kissinger* v. *Board of Trustees*, 5 F.3d 177 (6th Cir. 1993), the Sixth Circuit likewise held that illicit motive is merely a sufficient, not a necessary, condition to trigger strict scrutiny. *Kissinger* involved a student's claim that her college

offended the Free Exercise Clause by requiring her to dissect animals despite her religious beliefs. *Id.* at 178-179. The court applied a disjunctive test drawn from *Smith*. *Id.* at 179. One part focused on the motive inquiry: It asked whether the curriculum was intended to "attack or exclude any individual on the basis of his or her religious beliefs." *Id.* But a separate part of the analysis—a part unconcerned with motive—asked only whether "evidence exist[ed] that any student was allowed to graduate without" participating in the challenged program. *Id.* If the answer had been "yes," the college's curriculum would not have been "generally applicable" and strict scrutiny would have applied. *See id.*

Kissinger squares with *Shrum*, *Midrash*, and *Blackhawk*. Like those cases, it stands for the proposition that laws singling out religious groups are categorically non-neutral or non-generally applicable. These holdings cannot be reconciled with the Seventh Circuit's ruling.

B. Four Circuits Have Adopted A Contrary Rule.

The First, Fifth, and Ninth Circuits have adopted a rule that squarely conflicts with the decisions above. In these circuits—and in the Seventh Circuit now—laws that impose differential treatment on religious groups do not categorically trigger strict scrutiny. Instead, such laws remain neutral and generally applicable unless their object was to target religious activity *because of* its religious nature. Certiorari is warranted to resolve this entrenched split.

The First Circuit. In *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir. 1999), parents challenged a Maine law that allowed the state to fund students' private-

school educations, provided the private schools were "non-sectarian." *Id.* at 59. The court rejected a Free Exercise challenge to this law, concluding that the *Smith-Lukumi* line of cases was "inapposite." *Id.* at 65. This was so because in *Lukumi* "the record showed a substantial animus against [religion] that motivated the law in question. No such showing has been made here." *Id.* The First Circuit, in other words, treated a showing that government singled out religion because of its religious nature as necessary, not merely sufficient, to state a Free Exercise claim, just as the Seventh Circuit did below.

The Ninth Circuit. The Ninth Circuit adopted this same approach in *KDM ex rel. WJM* v. *Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999), *cert. denied*, 531 U.S. 1010 (2000). *KDM* involved an Oregon regulation allowing the provision of state-funded special-education services to private-school students, but only if the services were provided in a "religiously-neutral setting." *Id.* at 1048. When KDM, a disabled child, transferred to a Christian school, the school district no longer allowed a vision specialist to visit him at his schoolhouse. The district instead required KDM—who was blind and suffered from cerebral palsy—to leave the school and travel to a firehouse down the street. *Id.*

KDM argued that the Oregon rule was non-neutral and non-generally applicable because the rule, on its face, treated students at private sectarian schools differently than students at private non-sectarian schools: The latter would not have had to leave their school grounds to receive services. A divided Ninth Circuit panel rejected this challenge. The majority recognized that "the Oregon regulation is not 'neutral.'" *Id.* at 1050. Even so, the majority held

that strict scrutiny was not triggered because "as applied here [the regulation] does not have 'the object or purpose * * * [of] suppression of religion or religious conduct.' " *Id.* (quoting *Lukumi*, 508 U.S. at 533). It concluded: "We agree with the [First Circuit] in *Strout* v. *Albanese*, [which] distinguished *Lukumi* because there was no evidence of 'a substantial animus * * * that motivated the law in question.' " *Id.* (quoting *Strout*, 178 F.3d at 65).

The Ninth Circuit, in short, did just what the Seventh Circuit did below: It conceded that a law singled out religion for unequal treatment but held that that was not enough; the plaintiff also had to show that the law's goal was to burden religious conduct precisely because it was religious conduct.

This holding inspired a pair of impassioned dissents. Judge Kleinfeld, dissenting from the panel decision, explained that "[t]he regulation at issue here is *not* neutral on its face. By requiring a 'religiously-neutral setting,' the government expressly and intentionally discriminates against religious as opposed to secular private schools." *Id.* at 1053 (Kleinfeld, J., dissenting) (emphasis in original). He concluded: "When the government, by a law not neutral on its face, treats people of one or all religions better or worse than others, the constitutional question is traditionally formulated so that the answer has to be 'No!' " *Id.*

KDM's petition for rehearing en banc was denied, but not before six judges heaped criticism on the panel's rule. Judge O'Scannlain, writing on behalf of Judges Kozinski, Nelson, Kleinfeld, Tashima, and Wardlaw, explained that the panel decision suffered from a "fundamental inconsistency with Supreme Court precedent" because under *Lukumi*, "a law that

is *non-neutral on its face*, like the Oregon regulation at issue here, triggers strict * * * scrutiny—even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus." *KDM ex rel. WJM* v. *Reedsport Sch. Dist.*, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis in original). Underscoring the need for this Court to provide clarity and uniformity, Judge O'Scannlain criticized the panel for "contribut[ing] to the growing confusion among the lower courts over the demands of the First Amendment." *Id.*

The Fifth Circuit. Finally, the Fifth Circuit has adopted the approach of the First, Seventh, and Ninth Circuits. In *World Wide Street Preachers Fellowship* v. *Town of Columbia*, 245 Fed. Appx. 336 (5th Cir. 2007), the Fifth Circuit announced in an unpublished opinion that "[t]he constitutional test[ ] for whether governmental action unconstitutionally infringes on the free exercise of religion" is "dependent on whether the restriction was motivated by the nature of the conduct that is restricted." *Id.* at 344. "[A] restriction of religious practices because of their religious nature must survive strict scrutiny. * * * Thus, the motivation for the restriction on the exercise of religion *must be established before the restriction can be legally analyzed.*" *Id.* (emphasis added). This holding is, by its plain terms, irreconcilable with decisions like *Shrum* and *Midrash*. After all, in those cases, the courts recognized that a restriction on religious exercise can—and should—be analyzed by examining nothing more than the restriction's unequal treatment of religion. In contrast, the Fifth Circuit—like the panel majority below—requires courts to divine "the

motivation for the restriction" before reaching any conclusion about its constitutionality.

* * *

The circuits thus divide four-to-four on the question presented by this petition. This persistent division has drawn the attention of not just prominent jurists but also academics. Professor Laycock, a leading religion-law scholar, has noted that "we have the *Smith/Lukumi* test, but we have considerable disagreement over what exactly that test means." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law 25, 26 (2000). Other commentators likewise have noted that "[t]he federal circuits have split on whether *Lukumi* requires an object to infringe upon religious practice before a law must be supported by a compelling government interest" and that "the Supreme Court has not addressed this split." Sarah Waszmer, *Taking It out of Neutral: The Application of* Locke*'s Substantial Interest Test to the School Voucher Debate*, 62 Wash. & Lee L. Rev. 1271, 1285 (2005).

On a broader level, the legal academy has long documented the lower courts' confusion about what it means to say government must be "neutral" toward religion. *See, e.g.*, Laycock, *supra*. That confusion has not escaped the attention of the Justices of this Court. In 1999, Justice Thomas noted that the "lower courts * * * are struggling to reconcile our conflicting First Amendment pronouncements," and suggested that the Court provide "much needed guidance." *Columbia Union College* v. *Clark*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from denial of certiorari). That guidance is needed more urgently today than it was then. This Court should exercise

its certiorari jurisdiction to resolve the deep divisions within the country.

II. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

The rule adopted below also conflicts with this Court's Free Exercise jurisprudence. This Court's cases establish that an underlying motive to burden religion may be a *sufficient*, but is not a *necessary*, condition to trigger strict scrutiny: Where unequal treatment exists, that is enough to render the governmental action non-neutral and non-generally applicable.[4] The Seventh Circuit's contrary holding leads to absurd results in practice, immunizing religion-targeting laws simply because they were adopted in good faith and for secular reasons. The Court should grant the writ and clarify that "neutrality" and "general applicability" do not turn on any showing of religious hostility. *See* S. Ct. R. 10(c) (certiorari is warranted when "a United States court of appeals * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court").

1. The Free Exercise Clause's modern history begins with *Smith*. *Smith* involved two men who were denied unemployment benefits after being fired for using peyote. 494 U.S. at 874. They challenged the denial, arguing that they were entitled to a religious exemption for their peyote use. The Court declined to apply strict scrutiny. It concluded that "the right of free exercise does not relieve an

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[4] It does not matter whether the treatment is unequal *vis a vis* another religious group or *vis a vis* a secular group. Either type of singling-out runs afoul of the First Amendment. *See Larson* v. *Valente*, 456 U.S. 228, 245-246 (1982).

individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (quotation omitted). The Court explained that "if prohibiting the exercise of religion" is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

The Court subsequently considered in *Lukumi* several municipal ordinances that were designed to prohibit Santeria animal sacrifice, while leaving activities such as fishing untouched. *Lukumi*, 508 U.S. at 543. The Court, per Justice Kennedy, held that the ordinances triggered strict scrutiny.

Justice Kennedy analyzed separately the "neutrality" and "general applicability" inquiries. As to the first, he noted that "*[a]t a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 531 (emphasis added). He explained that "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. That "minimum requirement" is violated if the law "refers to a religious practice without a secular meaning discernible from the language or context." *Id.*

In a separate section of his neutrality analysis—a section joined only by Justice Stevens—Justice Kennedy wrote that "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases." *Id.* at 540. He suggested that "[h]ere, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence," including legislative

history. *Id.* (citing *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-268 (1977)). Having examined this evidence, Justice Kennedy concluded that the ordinances "were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice." *Id.* (quoting *Arlington Heights*, 429 U.S. at 279).

Writing for a majority again, Justice Kennedy "turn[ed] next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability." *Id.* at 542. Here he abandoned his concerns for "legislative object" and focused on the differential treatment of similarly situated actors: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 542-543. He concluded that the ordinances were non-generally applicable because they burdened Santeria animal sacrifice while not burdening other practices—fishing, for example—that also undermined the ordinances' ostensible goals. *Id.* at 544-545.

Justice Scalia, joined by Chief Justice Rehnquist, concurred in part but rejected Justice Kennedy's analogy to the Equal Protection Clause. He explained that First Amendment analysis does not require "determination of legislative motive." *Id.* at 558 (Scalia, J., concurring in part and concurring in the judgment). He explained that "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Id.* at 559. For that reason, it would not matter "that a legislature consists entirely of the

pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens." *Id.*

2. The panel majority below viewed *Smith* and *Lukumi* as cases about motive. According to the panel, *Smith* and *Lukumi* require not just that religious activity be singled out but also that the singling-out be motivated by the activity's religious aspects. That rule, however, conflicts with *Smith* and *Lukumi* in at least three ways.

a. *First*, a motive requirement cannot be extracted from *Lukumi*. The Court focused on legislative "object" only when analyzing one of the two Free Exercise inquiries—neutrality—and not the other—general applicability. The general-applicability inquiry was instead concerned with differential treatment of similarly situated entities. *See Lukumi*, 508 U.S. at 542-544. Indeed, the majority's explanation of "general applicability" used language that cannot be reconciled with a motive requirement: It wrote that government, even "*in pursuit of legitimate interests*, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542-543 (emphasis added). Further, even the neutrality discussion was not so limited. *Lukumi* did not announce that an intent to suppress religion was *required* to deem a law non-neutral, but only that it was sufficient. *See id.* at 532 ("*At a minimum*," the Clause pertains to a law that "regulates or prohibits conduct because it is undertaken for religious reasons.") (emphasis added). And importantly, the portion of *Lukumi* tying the Free Exercise Clause to *Arlington Heights*-style "because of, not in spite of" equal-protection analysis garnered only two votes.

These points have led four circuits to conclude that the *Smith-Lukumi* line does not announce a motive requirement—a conclusion with which the legal academy agrees. "Whatever else it may be, *Lukumi* is not a motive case. * * * Seven Justices failed to find bad motive, but nine voted to strike down the ordinances." Laycock, 40 Cath. Law at 28. Then-Professor (now Judge) McConnell reached the same conclusion: "*Smith* did not limit free exercise protection to laws motivated by 'religious bigotry,' 'persecution,' or even 'animus or hostility to the burdened religious practices' * * *. Rather, *Smith* held that the Free Exercise Clause applies to laws that are not neutral or generally applicable (regardless of their motivation)." Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 167 (1997); *see also* Laurence H. Tribe, *American Constitutional Law* § 5-16, at 956 (3d ed. 2000) (same); 5 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 21.6, at 106 (3d ed. 1999) (same).[5]

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[5] This Court has decided one Free Exercise case since *Lukumi*, but it is not to the contrary. In *Locke* v. *Davey*, 540 U.S. 712 (2004), the Court held that a government's decision not to fund certain religious instruction is permissible unless it (1) burdens religious practice *or* (2) is the product of bad motive. *See Locke*, 540 U.S. at 720; *see also* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 216 (2004). Here, Section 30 concededly imposes a substantial burden on religious practice. *Locke*'s "motive" discussion therefore is irrelevant. In any event, *Shrum*, *Midrash* and *Blackhawk*—all of which rejected a motive requirement—were decided after *Locke* was handed down. *Locke* therefore has not ameliorated the circuit split.

The Seventh Circuit ignored this guidance—and the holdings of four sister circuits—when it announced its contrary rule. In so doing it saw fit to rely explicitly on the equal-protection portion of *Lukumi*, even though that portion attracted just two votes. App. 34a. Its motive requirement, in short, relies on portions of *Lukumi* that were rejected by most of the Court and cannot in any event be squared with the rest of *Lukumi*'s text.

b. *Second*, the inclusion of a motive requirement, even in cases where unequal treatment and burden have been shown, is unfaithful to the plain language of both the Free Exercise Clause and the Court's test. As to the former, the Court was careful to note in *Smith* that the rule adopted there was a "permissible reading of the [constitutional] text." 494 U.S. at 878. Not so with the Seventh Circuit's approach: It looks only to "the purposes for which legislators enact laws," and not, like the Clause itself, "to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment). And as to the latter, the Seventh Circuit's approach hews to the plain meaning of neither the word "neutral" nor the phrase "generally applicable." "Neutral" means "taking neither side," *The New Shorter Oxford English Dictionary* (2005); it can hardly be said that a law extending benefits to all religious adherents and then withdrawing them from a small group is neutral. It is still more difficult to claim such a law is generally applicable. "Taking 'generally applicable' at its literal English meaning, the law has to apply to everyone, or nearly everyone." Laycock, 40 Cath. Law at 26-27. Not so with Illinois RFRA after the addition of Section 30.

Because the Seventh Circuit's approach strays from the plain meaning of "neutral" and "generally applicable" it creates the potential for absurd results. Say, for example, that a Virginia law provided: "All religious adherents shall be entitled to strict-scrutiny protection for their religious exercise, except those who belong to churches or synagogues in downtown Richmond." It is difficult to imagine how such a law could be considered "neutral" or "generally applicable," regardless of the legislature's motivation in enacting it. And yet this hypothetical law is identical in every relevant respect to the law deemed neutral and generally applicable by the court below.[6]

c. *Third*, and finally, the approach adopted by the Seventh Circuit conflicts with this Court's cases because it effectively collapses the Free Exercise inquiry announced in *Smith* and *Lukumi* from two stages into one. Under *Smith* and *Lukumi*, a court must first determine whether a law is neutral and generally applicable; if it is not, strict scrutiny applies and the court *then* considers the government's interest, determining whether it is "compelling." Under the Seventh Circuit's approach, by contrast, consideration of the government's interest is imported into stage one of the analysis and permitted to distort the neutrality and general-applicability inquiries. Under the Seventh Circuit's

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[6] That the hypothetical law mentions "church" and "synagogue," while Section 30 avoids words that connote religion, is not a relevant difference. After all, "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language *or context*." *Lukumi*, 508 U.S. at 533 (emphasis added). Section 30 lacks a discernible secular meaning when read in context, for it amends a law—the Illinois RFRA—that has religion as its only subject.

approach, so long as the government can identify some legitimate, secular reason for its differential treatment, that is the end of the inquiry. This rule radically restricts the Free Exercise Clause protection that *Smith-Lukumi* carefully preserved.

III. THE CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION.

1. Free-exercise cases are far from rare—several hundred have been decided just in the federal appellate courts in the past decade—and this case presents an ideal vehicle to address a question about free-exercise doctrine that has vexed the lower courts since *Smith* and *Lukumi* were handed down. The question presented was squarely raised and addressed below. App. 31a-36a. Other circuits have weighed in with analyses so clearly incompatible as to be outcome-determinative. *Supra* at 13-19. And there are no procedural complications that would prevent the Court from reaching the merits.

The fact that the panel majority speculated in dicta that Chicago could satisfy strict scrutiny creates no barrier to this Court's review. Indeed, even respondents have admitted that this portion of the majority's opinion was "wholly unnecessary to the decision." Answer of Defendants-Appellees to Petition for Panel Rehearing or, in the Alternative, Rehearing En Banc 13 (filed Nov. 16, 2007). It was also inappropriate because the strict-scrutiny test is a heavily fact-bound inquiry—one which an appellate court is ill-suited to resolve in the first instance on an appeal arising from a motion to dismiss. *See* App. 63a (Ripple, J., dissenting). Moreover, the only federal judge ever to apply strict scrutiny to the O'Hare plan on a fully developed factual record

concluded that the government had failed to carry its burden of demonstrating the existence of "least restrictive means." *Village of Bensenville*, 457 F.3d at 77 (D.C. Cir. 2006) (Griffith, J., concurring in part and dissenting in part). Judge Ripple was therefore exactly right to criticize the majority for ruminating in dicta on the strict-scrutiny test when "there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here." App. 63a. Because this Court is not bound even by its own dicta, *see Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006), it need not be detained by that of the panel majority below.

Nor should this Court be deterred by any fear that, as a practical matter, petitioners' victory on the merits would block an expansion of O'Hare. Petitioners are not Luddites seeking to block modern improvement to O'Hare. They instead simply want to ensure that their religious cemetery is not destroyed if there are in fact less destructive alternatives—the very purpose of the strict-scrutiny analysis. To that end, petitioners themselves have identified alternative designs that would save St. Johannes while allowing the O'Hare expansion to proceed *almost exactly* as Chicago has envisioned it. *See supra* at 12; *Village of Bensenville*, 457 F.3d at 77 (Griffith, J., concurring in part and dissenting in part) (noting petitioners' alternative designs and finding that the FAA offered only "conclusory responses" that did not allow the court to "determine if any of these alternatives are a less restrictive means"). The Court therefore may take this opportunity to clarify the Free Exercise Clause's meaning without fear that "strict mechanical

adherence" to the resulting doctrine would "produce[ ] absurd results." *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 151 (1990) (Stevens, J., dissenting).

2. It has been 15 years since the Court squarely addressed the issues presented by this case. In that time, an impressive list of legal lights—judges, scholars, even a Justice of this Court—have recognized that the lower courts' Free Exercise jurisprudence is hopelessly divided. Because the question whether governmental conduct violates the Constitution should not turn on accidents of geography, this Court should grant the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the

UNITED STATES COURT OF APPEALS
for the SEVENTH CIRCUIT

No. 05-4418

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,

Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, the FEDERAL AVIATION ADMINISTRATION, and MARION C. BLAKELY, Administrator of the Federal Aviation Administration,

Defendants-Appellees.

Nos. 05-4450 & 05-4451

VILLAGE OF BENSENVILLE, VILLAGE OF ELK GROVE, ROXANNE MITCHELL, REST HAVEN CEMETERY ASSOCIATION, ROBERT PLACEK, and LEROY H. HEINRICH,

Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, the FEDERAL AVIATION ADMINISTRATION, and MARION C. BLAKELY, Administrator of the Federal Aviation Administration,

Defendants-Appellees.

Nos. 05-4418, 05-4450 & 05-4451

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 03 C 3726—**David H. Coar**, *Judge.*

ARGUED JAN. 10, 2006; JUNE 7, 2006—

DECIDED SEPT. 13, 2007

Before: BAUER, RIPPLE, and WOOD, Circuit Judges.

WOOD, *Circuit Judge.* Mention Chicago to almost any person who has been on an airplane, and that person will immediately think of Chicago's O'Hare International Airport. It is one of the busiest airports in the world: in 2005, more than 76.5 million passengers passed through its facilities, along with 1.7 million tons of freight. See http://www.flychicago.com/events/KidsPage2006/OHareHistory.shtm (last visited August 27, 2007). It is also of central importance to the economy of Chicago and

Northern Illinois, generating approximately 514,000 jobs for the region and nearly $37 billion a year in economic development. *Id.* Responding to growth in demand for O'Hare's services, the Illinois General Assembly passed the O'Hare Modernization Act (OMA), 620 ILCS 65/5, in 2003, in order to improve and expand the airport. This case deals with certain land acquisitions contemplated by that legislation.

We consolidated these appeals for decision because each raises challenges to the same district court order in lawsuits filed by objectors to the modernization project. In that order, the court denied a motion for leave to file a second amended complaint (for all but one count) and refused to enjoin the City of Chicago's plan to acquire each plaintiff's property in order to build additional runways at O'Hare. In appeal number 05-4418, the St. John's United Church of Christ and two of its parishioners (collectively, St. John's) challenge the district court's denial of their motions for leave to file a second amended complaint and for a preliminary injunction. St. John's claims that the City's attempt to condemn a cemetery located on church property violates the First Amendment's Free Exercise Clause, the Fourteenth Amendment's Equal Protection Clause, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* We consider only the claims St. John's has asserted against the City; its claims against the Federal Aviation Administration (FAA) were resolved in the FAA's favor by the court of appeals for the

District of Columbia Circuit in *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006).[1]

In appeal number 05-4450, the Villages of Bensenville and Elk Grove (Municipal Plaintiffs) contend that the district court erred in concluding that it lacked jurisdiction to review their claims against the FAA. Lastly, in appeal number 05-4451, we consider the challenge of the Rest Haven Cemetery Association and two members of its board of directors (collectively, Rest Haven) to the district court's dismissal of the first amended complaint. Rest Haven was not named in the proposed second amended complaint because the City no longer plans to acquire its cemetery. The district court concluded, for that reason, that its claim was

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[1] The main issue before the D.C. Circuit concerned whether the FAA had violated the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, by approving the City's plan and determining that the plan was eligible for federal funding. As an "agency . . . of the United States," § 2000bb-2(1), the FAA, unlike the City, falls within the scope of RFRA and thus must meet the requirements of strict scrutiny when its actions substantially burden exercise of someone's religion. The D.C. Circuit considered whether any potential burden on the exercise of religion in this case could be fairly attributable to the FAA by virtue of its having approved the City's plan. Because "[t]he expansion plan for the airport, which is owned by the City, was prepared and will be implemented by the City, which is prepared to proceed without federal funds if necessary," the court found that it was the City, not the FAA, that was responsible for any potential burden on religion that resulted from the plan. *Bensenville*, 457 F.3d at 57. It thus rejected the RFRA claims against the FAA without reaching the question whether the FAA had shown a compelling governmental interest supporting its decision.

moot; Rest Haven disagrees with that assessment. In Rest Haven's appeal, we also consider the same question raised by the Municipal Plaintiffs, namely, whether the district court had jurisdiction to consider Rest Haven's claims against the FAA. We conclude that the district court navigated its way through these complex issues successfully, and we thus affirm its judgment in all respects.

I

In the summer of 2001, the U.S. Senate Commerce, Energy, and Transportation Committee held hearings in Chicago to discuss the ways in which delays at O'Hare contribute to excessive aviation delays throughout the United States. During the course of these hearings, the Committee strongly hinted that if the City of Chicago and the State of Illinois did not reach a decision on airport expansion before September 1, 2001, Congress would likely intervene.

On June 29, 2001, the City announced its plan to increase O'Hare's capacity; this plan later developed into the O'Hare Modernization Program (OMP). The OMP proposed to correct some of the inefficiencies created by the airfield's outdated configuration of seven intersecting runways (which include a "runway triangle" created by the three original intersecting runways that lie north of the present terminals) by creating six parallel and two crosswind runways. The proposed design resembles the more effective runway architecture that has been employed at Hartsfield-Jackson Atlanta International Airport and the Dallas/Fort Worth International Airport. In contrast to

the current layout of intersecting runways, in which the ability to use one runway is limited by whether an aircraft is using any of the others, the proposed configuration would permit a constant stream of take-offs and landings on each parallel runway, regardless of the activity that may simultaneously be occurring on adjacent runways.

On December 5, 2001, the Mayor of Chicago and the Governor of Illinois announced that they had reached an agreement on the central components of the proposed OMP. Shortly thereafter, the FAA submitted its Notice of Intent to Prepare an Environmental Impact Statement (EIS), which is a "detailed analysis . . . conducted to determine if, or the extent to which, a particular agency action will impact the environment." *Heartwood, Inc. v. United States Forest Serv.*, 230 F.3d 947, 949 (7th Cir. 2000). All federal agencies are required to prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." See the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C).

In June of 2002, the City announced its plan to acquire 433 acres of land located in the Villages of Elk Grove and Bensenville, two municipalities adjacent to O'Hare, in anticipation of the airport's expansion. A wide variety of properties were scheduled for condemnation, including a number of homes and businesses, a police and fire station, an elementary school, several parklands, and the two cemeteries at issue here—St. Johannes and Rest Haven, owned by the St. John's United Church of Christ and the Rest Haven Cemetery Association, respectively. The

Municipal Plaintiffs responded by filing suit in state court seeking both a declaration that any effort to acquire the desired property without first obtaining a "certificate of approval" from the Illinois Department of Transportation was beyond the City's authority under the Illinois Aeronautics Act, see 620 ILCS 5/47, and a preliminary injunction preventing the City from proceeding with its land acquisition plan. On July 9, 2002, the Circuit Court of DuPage County granted the municipalities' requested relief; the Illinois Appellate Court affirmed its decision. See *Philip v. Daley*, 790 N.E.2d 961 (Ill. App. Ct. 2003).

Faced with this setback, the City turned to Springfield and the Illinois General Assembly for help. It was successful in persuading the legislature to enact the OMA in May of 2003. See 620 ILCS 65/5. The Act's statement of findings and purposes notes the importance of O'Hare to both the state and national air transportation system and affirms the necessity of acquiring adjacent properties as part of the modernization program. See OMA § 5(a)(1), (2), (5). In addition, the Act proclaims that "[i]t is the intent of the General Assembly that all agencies of this State and its subdivisions shall facilitate the efficient and expeditious completion of the O'Hare Modernization Program to the extent not specifically prohibited by law, and that legal impediments to the completion of the project be eliminated." OMA § 5(b).

The Act specifically addresses the issue of acquisition of property in several places. It does so generally in section 15, which grants to the City "[i]n addition to any other powers the City may have, and

notwithstanding any other law to the contrary," the power to

> acquire by gift, grant, lease, purchase, condemnation . . . or otherwise any right, title, or interest in any private property, property held in the name of or belonging to any public body or unit of government, or any property devoted to a public use, or any other rights or easements, including any property, rights, or easements owned by the State, units of local government, or school districts, including forest preserve districts, for purposes related to the O'Hare Modernization Program.

OMA § 15. Lest there be any doubt on the particular topic of cemeteries, the Act continues: "The powers given to the City under this Section include the power to acquire, by condemnation or otherwise, any property used for cemetery purposes within or outside of the City, and to require that the cemetery be removed to a different location." See also *id.* § 92 (amending the Illinois Municipal Code, 65 ILCS 5/11-51-1, to make it clear that the City of Chicago need not obtain the consent of a cemetery's owner in order to exercise its powers under § 15 of the OMA, even though such consent is normally required).

The OMA amends many statutes—indeed, as counsel for the City argued, it seems to have amended every statute that someone thought might stand in the way of the OMP. Thus, for example, it amends the Downstate Forest Preserve District Act, 70 ILCS 805/5e, OMA § 93; the Vital Records Act, 410 ILCS

535/21, OMA § 93.5; the Illinois Aeronautics Act, 620 ILCS 5/38.01, OMA § 94; and the Code of Civil Procedure, 735 ILCS 5/2-103, OMA § 95. Among these many modifications is the one that is central to this litigation: the addition of a new section 30 to the Illinois Religious Freedom Restoration Act (IRFRA), 775 ILCS 35/1 *et seq.* OMA § 96. The IRFRA provides generally that the "[g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the b rden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." 775 ILCS 35/15. That broad language was qualified by the new section 30, which states: "Nothing in this Act [*i.e.* IRFRA] limits the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or the graves located therein." 775 ILCS 35/30.

On May 30, 2003, shortly after the legislature enacted the OMA, the Municipal Plaintiffs, St. John's, and Rest Haven filed suit in the United States District Court for the Northern District of Illinois against the City of Chicago, Mayor Richard M. Daley, the State of Illinois, Governor Rod Blagojevich, and both the FAA and its administrator alleging a number of violations of federal law. On June 19, 2003, Plaintiffs filed an amended complaint. Most of the counts of the amended complaint challenged the City's plan to acquire land before the FAA issued its EIS or Record of Decision (ROD). Additionally, all of the Plaintiffs

alleged that the City, along with the Mayor, violated NEPA and its implementing regulations, the National Historic Preservation Act (NHPA), 16 U.S.C. § 470, *et seq.*, § 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), as well as provisions of the Administrative Procedures Act, 5 U.S.C. § 706.

In the amended complaint, St. John's and Rest Haven also asserted a number of claims based on religion against the City. They alleged that the City, in proposing to condemn their cemeteries without demonstrating a compelling governmental interest and use of the least restrictive mechanism, as IRFRA ordinarily requires, violated their constitutional rights under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. These plaintiffs charged that the City is "targeting" their religious activities and posing a substantial burden on their ability to practice their religion. Plaintiffs also alleged that the City's plan to condemn their cemeteries violated the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* Additionally, they asserted violations of the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process clause. Finally, these Plaintiffs raised similar religion-based claims against the State of Illinois and Governor Blagojevich, and against the FAA and its administrator, including an allegation that the FAA violated the federal RFRA. On March 29, 2005, the district court dismissed the State of Illinois and Governor Blagojevich from the case on Eleventh Amendment immunity grounds.

As this suit was pending before the district court, the parties entered into a court-approved order under which the City agreed that it would not acquire property in Bensenville and Elk Grove, including the St. John's and Rest Haven Cemeteries, until the FAA issued an EIS or a ROD. At the end of 2003, the City began to move forward with other components of its plan to expand O'Hare, seeking FAA approval for over $1.3 billion in federal funds for "Phase One" of the OMP. Specifically, the City requested about $300 million in airport improvement program discretionary funds, $63 million in entitlement funds, and over $1 billion in Passenger Facility Charge (PFC) funds. Phase One of the project was to include the demolition of the cemeteries, as well as other property in the villages. In late July of 2005, the FAA issued its final EIS, which compared the environmental impact of the City's proposal with other alternatives and concluded that the City's airport plan, with some minor revisions, was the preferred course. The EIS also reviewed the legal issues raised by St. John's and Rest Haven, ultimately concluding that if the City's plan was approved in the ROD, the St. Johannes Cemetery would be relocated, while the Rest Haven Cemetery would not.

On September 30, 2005, the FAA issued its ROD granting the City's request for approval of its airport layout plan. The ROD considered St. John's RFRA claims and concluded that although the acquisition and relocation of the St. Johannes cemetery was likely to burden the exercise of the parishioners' religion substantially, the City had a compelling interest in

relocating the cemetery in order to make O'Hare more efficient. The same day that the FAA issued its ROD, the Municipal Plaintiffs and St. John's filed a petition for review of the EIS and ROD in the D.C. Circuit. Their petition alleged, among other things, that the FAA's approval of the airport layout plan violated a number of provisions of federal law, including the First and Fifth Amendments and RFRA. Along with their petition for review, the Plaintiffs filed an emergency motion for a stay pending appeal and a motion for an administrative stay, which the D.C. Circuit granted. Rest Haven was not a party to this litigation.

In light of the FAA's approval of the airport layout plan and the claims pending before the D.C. Circuit, the district court issued an order to show cause why certain parties and claims should not be dismissed. Given that the Rest Haven Cemetery had by then been excluded from the OMP and that the City was not challenging this step, the district court suggested that Rest Haven should voluntarily dismiss itself from the suit. The district court also ordered the Plaintiffs to show cause why Mayor Daley should not be dismissed from the suit, because suing him in his official capacity and suing the City of Chicago amounted to the same thing. The district court also questioned its jurisdiction to review claims asserted against the FAA involving the ROD.

Before the district court issued its show cause order, however, the FAA informed the D.C. Circuit that it planned to award the City the $363 million in discretionary funds it had requested to begin the implementation of the first phase of the OMP. It made

this announcement despite the fact that it had not yet formally rendered a decision granting the City's request. The City argued that in the absence of the FAA's final order rendering a decision on funding, the court was without jurisdiction to consider Plaintiffs' NEPA and RFRA claims. On October 25, 2005, the D.C. Circuit denied St. John's and the Municipal Plaintiffs' emergency motion for a stay pending appeal, determining that they had not demonstrated either the irreparable injury or the likelihood of success on the merits required for the issuance of a stay pending review. At that point, the court did not address the jurisdictional question.

On October 26, 2005, St. John's and the Municipal Plaintiffs returned to the district court and filed a motion for leave to file a second amended complaint. Rest Haven was not listed as a party to the motion for leave to file the second amended complaint. The proposed second amended complaint included a claim that the FAA had violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, when it allegedly ignored the Plaintiffs' requests for documents relating to O'Hare's expansion. On October 31, 2005, St. John's filed a motion for a temporary restraining order and a motion for a preliminary injunction, seeking to halt all action on the City's part while all these challenges were pending. The district court entered a temporary restraining order as it reviewed these motions.

After filing these motions in district court, the Plaintiffs then filed a docketing statement of issues in the D.C. Circuit. In addition to the claims they raised against the FAA before the district court, Plaintiffs

asked the D.C. Circuit to decide whether it was improper for the FAA to fail to rule on Chicago's funding applications, whether the FAA had issued an unlawful ROD, and whether their First Amendment and RFRA claims were entitled to *de novo* review of disputed factual questions in an Article III court.

At that juncture, the district court dismissed Rest Haven from the litigation. Because the City no longer planned to acquire the Rest Haven Cemetery, and because Rest Haven did not present any argument explaining why or how it might be affected by either the City's or the FAA's actions in their response to the order to show cause, the district court held that its claims were moot. The court also dismissed Mayor Daley from the litigation, concluding that the Plaintiffs had not responded to the issue it raised in the order to show cause (whether it was redundant to sue both the City and the Mayor in his official capacity). The Plaintiffs do not challenge the dismissal of Mayor Daley from this suit on appeal.

With respect to St. John's religious claims against the City, the district court concluded that the Plaintiffs failed to state a claim upon which relief could be granted under the Free Exercise Clause or the Equal Protection Clause. It found that the OMA was constitutional on its face and that there was no indication that any of the City's proposed actions were motivated by St. John's religious affiliation. The district court also denied St. John's motion for leave to file a second amended complaint with respect to these claims, finding them to be similarly lacking. Additionally, the district court dismissed all counts of

the complaint that pertained to RLUIPA, concluding that the City's plan to condemn the St. Johannes Cemetery was not a "land use" regulation as contemplated by that statute.

The district court also dismissed the bulk of St. John's and the Municipal Plaintiffs' claims against the FAA and its administrator. It concluded that it lacked jurisdiction to review challenges to the FAA's actions concerning the ROD because under 49 U.S.C. § 46110, those claims fell within the exclusive jurisdiction of the court of appeals. Indeed, as the court recognized, the D.C. Circuit was already considering these claims. After dismissing these claims, all that remained was St. John's and the Municipal Plaintiffs' FOIA claim, for which the district court granted the motion for leave to file a second amended complaint. Given the dismissal of virtually all of the Plaintiffs' claims against the City and the FAA, the district court vacated the temporary restraining order and denied the motion for a preliminary injunction as moot. Plaintiffs have appealed from that decision. See 28 U.S.C. § 1292(a)(1).

II

We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, accepting as true "all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)). We

may affirm the dismissal only if the complaint fails to set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*, 127 S. Ct. at 1974. As we held in *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 2007 WL 2406859 (7th Cir. Aug. 24, 2007), a district court should dismiss a complaint if "the factual detail . . . [is] so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Id.* at *5. A district court's decision whether to allow a party to file a second amended complaint, however, is reviewed for abuse of discretion. See *Doherty v. Davy Songer, Inc.*, 195 F.3d 919, 927 (7th Cir. 1999).

With respect to the district court's decision that St. John's motion for a preliminary injunction is moot, we review the court's "findings of fact for clear error, its balancing of the factors for a preliminary injunction under the abuse of discretion standard, and its legal conclusions *de novo*." *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 761 (7th Cir. 2001). In assessing whether a preliminary injunction is warranted, we must consider whether the party seeking the injunction has demonstrated that "1) it has a reasonable likelihood of success on the merits; 2) no adequate remedy at law exists; 3) it will suffer irreparable harm if it is denied; 4) the irreparable harm the party will suffer without injunctive relief is greater than the harm the opposing party will suffer if the preliminary injunction is granted; and 5) the preliminary injunction will not harm the public interest." *Id.*

III

Before turning to the merits, we must address two jurisdictional issues that the Municipal Plaintiffs and Rest Haven have raised. The first is whether the district court erred in dismissing with prejudice all claims brought by Rest Haven as moot, because the City no longer plans to acquire that cemetery. Second is the question whether the district court correctly dismissed the Municipal Plaintiffs' claims against the FAA for lack of jurisdiction based upon 49 U.S.C. § 46110. We review *de novo* the district court's grant of a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), which includes a dismissal on mootness grounds. See, *e.g., Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 771 (7th Cir. 2002). "When reviewing a dismissal for lack of subject matter jurisdiction, we note that a district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999). In considering such a motion, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.*

A. Rest Haven

At the beginning of the EIS process, the City submitted to the FAA a proposed revision to its airport layout plan that included the construction of a runway in an area that would require the relocation of existing

air cargo facilities. In that proposed plan, the City indicated that it wanted to move these facilities to the site that is currently the Rest Haven Cemetery. The FAA concluded in its final EIS, however, that it would be possible to relocate the air cargo facilities without disturbing Rest Haven. Ultimately, on September 29, 2005, the FAA issued its ROD approving a revised airport layout plan "that depict[ed] cargo building repositioning, but also show[ed] that Rest Haven Cemetery w[ould] remain in private ownership." The ROD also reaffirmed that there would be no basis for the mandatory reinterment of bodies at Rest Haven, and it assured that the cemetery would "remain available for future burials, and for visitation and care of the graves by members of the public." This convinced the district court that there was no longer a live controversy among Rest Haven, the City, and the FAA; it therefore dismissed all counts brought by Rest Haven in the first amended complaint with prejudice.

Like the district court, we see no reason why Rest Haven should not be dismissed from this litigation. Under Article III, § 2 of the United States Constitution, federal court jurisdiction is limited to "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). "[W]hen the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," the case is (or the claims are) moot and must be dismissed for lack of jurisdiction. *Powell v. McCormack*, 395 U.S. 486, 496 (1969); see also *Stotts v. Cmty. Unit. Sch. Dist. No. 1*, 230 F.3d 989, 990-91 (7th Cir. 2000). The fact that Rest Haven at one point was entitled to pursue this action makes no difference.

In order to satisfy Article III's jurisdictional requirements, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). As of July 2005, "the dispute between the[se] parties no longer rages"; in fact, the FAA granted Rest Haven precisely the relief it wanted—the agency approved a layout plan that leaves it alone. *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994). In fact, the ROD goes one step further: it requires the City to provide a road to the cemetery to allow continued access to its grounds and to ensure that its daily activities are not unduly disturbed by the surrounding construction. Once a plaintiff's entire demand is satisfied, "there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under FED. R. CIV. P. 12(b)(1), because he has no remaining stake." *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991); see also *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (noting that a case becomes moot when a court's decision can no longer affect the rights of litigants in the case before it and would be nothing but an advisory opinion on hypothetical facts).

In response to the district court's order to show cause why its claims should not be dismissed, Rest Haven complained that it was uncomfortable without an enforceable court order providing that "Chicago will preserve and leave forever undisturbed the graves of

the departed at Rest Haven," as well as an order requiring Chicago to "guarantee the Rest Haven plaintiffs continued access to the Rest Haven Cemetery." In its reply brief here, Rest Haven concedes that the City's representation that it will not acquire Rest Haven Cemetery "may moot the claim for injunctive relief." See *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 596 (7th Cir. 2006) ("In an action seeking only injunctive relief . . . once the threat of the act sought to be enjoined dissipates, the suit must be dismissed as moot."). At oral argument, however, Rest Haven appeared to defend the necessity of the order it requested on the ground that, without such an order, the City might unilaterally terminate its agreement not to condemn Rest Haven. This fear is motivating some of Rest Haven's religious adherents to bury their loved ones elsewhere out of fear of future disinterment.

If the City could change its mind at any time, Rest Haven might have a point. But that is not the case here. There is no indication on this record that the City has the authority to modify the airport layout plan without FAA approval. As the City represented at oral argument, it took approximately four years for the FAA to approve the plan at issue, and the City has no immediate intention to seek modification of the approved airport layout plan in favor of one that requires it to condemn the Rest Haven Cemetery. To the contrary, the City stated that it is quite eager to implement the approved plan. Rest Haven's fear that the City may one day change its mind and seek to acquire its cemetery is rooted in nothing but

speculation. In order to satisfy Article III's justiciability requirements, "[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). If and when the day comes when the City or some other governmental entity wants to condemn the Rest Haven Cemetery, Rest Haven will have ample opportunity to defend itself before all appropriate tribunals.

If what Rest Haven wants is a perpetual injunction against the City requiring it to leave its cemetery undisturbed until the end of time, it is overreaching. The power of eminent domain is a fundamental power of government, and a court cannot restrict future governmental authorities from its proper use. Moreover, any injunction issued by a court of equity is itself subject to later modification. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992); *New York State Ass'n for Retarded Children Inc. v. Carey*, 706 F.2d 956, 967 (2d. Cir. 1983) ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible."). Courts grant injunctive relief with the understanding that there will be an "opportunity for modifying or vacating [the] injunction when its continuance is no longer warranted." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 298 (1941). Neither the district court nor this court is empowered to enjoin the City from *ever* seeking to acquire Rest Haven's property, no matter what the reason. Rest Haven also indicated at oral argument that it would be satisfied with a court order finding as a fact that there

would be a substantial burden to its First Amendment rights in the event of a future taking. This will not do. In the absence of a live controversy, such an order would be no more than an advisory opinion, which, as we are sure Rest Haven knows, federal courts are without constitutional authority to issue.

Rest Haven also argues that its claims are not moot because it wants a declaratory judgment establishing that OMA's amendment to IRFRA violates the First Amendment and the RLUIPA. This, at least, looks more like an ongoing controversy. Because Rest Haven did not advance this argument either before the district court or in its opening brief, however, we consider it waived. See *Nelson v. LaCrosse County Dist. Attorney*, 301 F.3d 820, 836 (7th Cir. 2002) (arguments raised for the first time in the reply brief are waived). Waiver or forfeiture aside, the argument has no merit. Even though *someone* may be affected by the IRFRA amendment, that "someone" is no longer Rest Haven, and it is well established that the "case or controversy" requirement applies to declaratory judgments, just as it applies to every other kind of litigation in federal court. See *Powell*, 395 U.S. at 518 ("The availability of declaratory relief depends on whether there is a live dispute between the parties. . . ."); see also *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001) (noting that a claim for declaratory judgment was moot where "relief . . . would have no impact on the parties to th[e] suit").

B. Municipal Plaintiffs and Rest Haven: FAA Claims

The district court also found that it lacked jurisdiction to review the Municipal Plaintiffs' and Rest Haven's claims against the FAA because these claims fell within the exclusive jurisdiction of the court of appeals under 49 U.S.C. § 46110. After dismissing Rest Haven from the litigation, the district court decided that it lacked jurisdiction to review the claims against the FAA that related to the issuance of the ROD. Because Rest Haven was not a party to this complaint, it has no "personal stake" in the appeal of the district court's denial of St. John's and the Municipal Plaintiffs' motion for leave to file a second amended complaint on this ground. See, *e.g.*, *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 609 (7th Cir. 2001) ("Under Article III, only a plaintiff with a personal stake in a case or controversy has standing."). Even if Rest Haven were a party to the second amended complaint and its claims were not moot, the district court would still lack jurisdiction to review either Rest Haven's or the Municipal Plaintiffs' claims against the FAA. The jurisdictional language in 49 U.S.C. § 46110 could not be plainer. It says that

> a person disclosing a substantial interest in an order issued by . . . the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator . . . in whole or in part under this part [or] part B . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of

> appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a). "Part B" refers to the Airport Development and Noise provisions of the same subtitle, see 49 U.S.C. § 47107, *et seq.*, which include the provision that grants the FAA the authority to review airport layout plans. See 49 U.S.C. § 47107(a)(16). The statute goes on to provide that the court of appeals has "exclusive jurisdiction to affirm, amend, modify or set aside any part of the order." 49 U.S.C. § 46110(a).

The Plaintiffs' arguments urging that the district court had the authority to consider these claims are without merit. First, Rest Haven argues that the federal RFRA, which Rest Haven claims the FAA has violated, commands that contested issues of fact pertaining to violations of that statute be tried in the federal district court. In support of this claim, they cite § 2000bb-1(c) of the Act, which provides that a person alleging a violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding" and that standing to assert such a claim is "governed by . . . article III of the Constitution." Plaintiffs urge that this language means that they are entitled to an Article III proceeding in which to resolve disputed issues of fact. Even assuming that Rest Haven's claims are not moot, however, the statute says nothing about exclusive jurisdiction of district courts to find facts in RFRA cases. Review of an agency action in the court of appeals surely qualifies as an Article III judicial proceeding. Nothing in RFRA purported to repeal the authority of federal administrative agencies to find

facts, subject to review by the courts of appeals; there was no silent elimination of the judicial review provisions of the Administrative Procedures Act. See 5 U.S.C. § 706. Furthermore, the fact that Rest Haven's claims against the FAA include allegations that the FAA violated the Constitution does not allow it to "bypass the administrative process" because "[t]he effect would be that important and difficult constitutional issues would be decided devoid of factual content." *Gaunce v. DeVincentis*, 708 F.2d 1290, 1293 (7th Cir. 1983) (holding that exclusive jurisdiction rested in the court of appeals in a case in which a pilot challenged an FAA order revoking her flight certificate on due process grounds); see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215-16 (1994) (indicating that while the "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," such a "rule is not mandatory," particularly when a plaintiff's "statutory and constitutional claims can meaningfully be addressed in the Court of Appeals") (internal citations omitted).

As further support for their argument that their claims against the FAA should be heard by the federal district court, both Rest Haven and the Municipal Plaintiffs contend that the misconduct of various FAA administrators made it impossible to develop the type of factual record necessary for meaningful appellate review. The Plaintiffs charge that the FAA has developed a compensation program that provides monetary rewards for FAA officials who make decisions that allow the construction of new runway projects;

that former Chicago employees (who had worked on previous O'Hare expansion projects) are currently FAA officials and employees; and that these administrators withheld thousands of documents that are not a part of the appellate record. Without the ability to present their claims to the district court, they fear, they will be stuck with the outcome of these tainted proceedings. Appellate courts, however, are certainly competent to hear a party's argument that there were flaws in due process at the agency level and remand the case to the agency with instructions to correct these problems. Additionally, any plaintiff can make an argument to the court of appeals that there were problems with the creation of the record before the administrative agency and thus in the record on appeal. See *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468-69 (1984) ("If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency, see *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593-94 (1980), or in some circumstances refer the case to a special master, see 28 U.S.C. § 2347(b)(3)."). In fact, Plaintiffs made these arguments before the Court of Appeals for the D.C. Circuit, which rejected them. See *Bensenville*, 457 F.3d at 72-73.

Lastly, Plaintiffs argue that the district court at least has jurisdiction over their NEPA claims, pursuant to 40 C.F.R. § 1506.1. That regulation provides that "[u]ntil an agency issues a record of decision . . . no action concerning the proposal shall be taken which would [h]ave an adverse environmental impact; or [l]imit the choice of reasonable alternatives." According

to Plaintiffs, the FAA has not made a substantive funding decision about the disposition of certain passenger facility charges (PFC) that amount to more than one billion dollars. This is money that the City needs to facilitate Phase One of the OMP. Without the federal money, the City cannot proceed with the implementation of Phase One, which includes the acquisition of land from the Municipal Plaintiffs. Plaintiffs argue that the City is attempting to subvert the requirements of NEPA by adhering to a policy of "destruction before decision," in disregard of this court's ruling in *Old Town Neighborhood Ass'n v. Kauffman*, 333 F.3d 732 (7th Cir. 2003), disapproving such a strategy. The district court decided that it had no jurisdiction over this claim either.

Perhaps because events continue to unfold, the Plaintiffs' argument in this respect seems to have unraveled. The regulation to which Plaintiffs refer prohibits action in the absence of an agency's issuance of a ROD. Here, though, the ROD and the accompanying EIS have been issued. More than that, in an agreed order between these parties, the City stipulated that it "[would] not acquire property in the Village of Bensenville and Elk Grove Village for the OMP, or acquire the Rest Haven or St. Johannes Cemeteries, unless and until the FAA has issued a Record of Decision following completion of an EIS for the OMP." At oral argument the FAA directed the Court's attention to § 12.3 of the ROD where the FAA made specific factual findings on the airport layout plan's effect on natural resources, in compliance with 49 U.S.C. § 47106(c)(1)(B). Plaintiffs contend that this

does not do the job, because while environmental findings have been made with respect to the airport layout plan, those findings did not focus on the specific project for which the City is seeking funding—the Phase One Project. Based on our reading of the record, however, the Phase One Project is a part of the airport layout plan for which the City has received FAA approval. Furthermore, the regulation does not prohibit action until the FAA has made *all* decisions with respect to funding; it says only that no action can be taken before the issuance of the ROD, which we now have. If these Plaintiffs wanted to challenge the environmental findings made by the FAA, they certainly could have included those claims in the petition for review of the ROD that they filed in the D.C. Circuit.

This shows Plaintiffs' NEPA challenge for what it is: a matter so intertwined with the ROD that it falls within the exclusive jurisdiction of the court of appeals. If we needed further reassurance on the point, we have it in the fact that Plaintiffs actually made the identical argument about NEPA compliance in their presentation to the D.C. Circuit. There, they argued that the FAA violated NEPA by issuing a ROD that approved of the airport layout plan without making any formal funding decisions. Before the district court and on appeal here, they argue that the FAA is violating NEPA by allowing the City to proceed with the acquisition of property in these villages before a funding decision has been made. Even if we did not think that this issue was under the court of appeals' exclusive jurisdiction, we do not think it wise to allow

either the Municipal Plaintiffs or Rest Haven to litigate the same issues, either concurrently or *seriatim*, in separate federal courts.

IV

We turn now to St. John's part of this case. The first question is whether St. John's is entitled, as a matter of state law, to the protection afforded by the Illinois Religious Freedom Restoration Act, 775 ILCS 35/30. If the OMA's amendment of IRFRA can withstand legal challenge, then the answer must be no; if not, then St. John's may have a point. Before the district court, St. John's argued that the OMA's amendment of IRFRA violated the Free Exercise Clause of the First Amendment. The Free Exercise Clause prohibits the government from "plac[ing] a substantial burden on the observation of a central religious belief or practice" without first demonstrating that a "compelling governmental interest justifies the burden." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the Supreme Court held that neutral laws of general applicability do not run afoul of the Free Exercise Clause, even if these laws have the incidental effect of burdening a religious practice. *Id.* at 883; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). In order to determine whether a law is neutral, as the Court used the term in *Smith*, we must examine the object of the law. A law is not neutral if "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. The related principle of "general applicability" forbids the

government from "impos[ing] burdens only on conduct motivated by religious belief" in a "selective manner." *Id.* at 543; see also *id.* at 531 ("Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

The Illinois legislature passed IRFRA in 1998 in response to both *Smith* and the Supreme Court's subsequent invalidation (as applied to the states) of the federal Religious Freedom and Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, *et seq.* See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that RFRA, as it applied to the states and their subdivisions, exceeded Congress's remedial powers under the Fourteenth Amendment). RFRA had been Congress's attempt to impose what it understood to be the pre-*Smith* "compelling interest test" to state measures affecting religious practices. Under RFRA, a governmental unit could not "substantially burden a person's exercise of religion even if the burden result[ed] from a rule of general applicability . . . unless [the government's action was] in furtherance of a compelling governmental interest and [was] the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1; see also *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Since the holding of *Boerne* was predicated on the scope of Congress's powers under section 5 of the Fourteenth Amendment, the Illinois legislature reasonably concluded that *Boerne* said nothing about its own ability under Illinois's Constitution to enact a measure affording special protection to religion. It did

so in IRFRA, using language that mirrors that of the federal RFRA. See 775 ILCS 35/15 ("Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest."). The legislation was expressly designed to afford greater protection to religious activity in Illinois than *Smith* holds is required under the federal Constitution. The legislature acted again in the OMA, however, taking back part of what IRFRA gave: it put religious institutions on the same footing as all other property owners for purposes of the O'Hare project. The OMA accomplishes this goal by adding a new § 30 to IRFRA; the new section states that nothing in IRFRA "limit[s] the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or graves located therein." 775 ILCS 35/30. As St. John's points out, the OMA also mentions cemeteries in § 92, which amends the Illinois Municipal Code, 65 ILCS 5/11-51-1, by allowing the City to remove cemetery remains for airport expansion without the assent of cemetery trustees or owners.

According to St. John's, a major tenet of its religious beliefs is that the remains of those buried at the St. Johannes Cemetery must not be disturbed until Jesus Christ raises these remains on the day of Resurrection. It asserts therefore that the City's plan to acquire and condemn the cemetery is a "sacrilege to

[its] religious faith." We accept those representations. St. John's continues with a claim that the OMA impermissibly targets the religious cemeteries adjacent to O'Hare, stripping them of the protection under IRFRA that is afforded to every other religious institution, including other religious cemeteries, in Illinois. The district court decided, however, that this was the wrong perspective: it saw no discrimination or targeting of religious institutions because *any* property, religious or otherwise, within the area designated for O'Hare expansion is subject to the extraordinary powers conferred in the OMA. It therefore dismissed all counts in the first amended complaint that asserted a free exercise violation and similarly denied the motion for leave to file a second amended complaint with respect to the free exercise claims, concluding that the Plaintiffs failed to state any free exercise claim on these facts.

Throughout these proceedings, St. John's has insisted that the relevant comparison is between the two cemeteries potentially affected by the O'Hare project and all other cemeteries or religious properties in the state. But this assumes the answer to the crucial question: what is the proper comparison to make?[2] *Lukumi* requires us to approach that question by asking whether the object of the OMA was "to infringe upon or restrict practices because of their religious motivation." 508 U.S. at 533. In looking at OMA, we

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[2] Our dissenting colleague answers this critical question in St. John's favor. For the reasons we set forth in the discussion that follows, we conclude that the City has the better of the argument.

must consider the act as a whole, as well as the part that the new § 30 of IRFRA (added by § 96 of the OMA) plays in it.

We begin, as *Lukumi* instructs, with the text of the OMA. As we noted earlier, the new § 30 of IRFRA says simply "Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein." In our view, this language does not "refer[ ] to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. Some cemeteries are affiliated with religious sects, others are not; even graves in cemeteries with a religious affiliation may be relocated because of natural necessity, for public health concerns, after a hurricane or flood, or for many other private or public reasons. We conclude there is nothing inherently religious about cemeteries or graves, and the act of relocating them thus does not on its face infringe upon a religious practice, as *Lukumi* uses that term. (We acknowledge the fact that the OMA addresses only cemeteries that are entitled to invoke the protections of IRFRA, but that is only because secular cemeteries presumably would have no extraordinary defense to the power of eminent domain to begin with.) We note in this connection that the Supreme Court held in *Lukumi* that the words "sacrifice" and "ritual" were not so closely associated with religious practice that a finding of facial non-neutrality was compelled. *Id.* at 534. If that was the case there, then it is straightforward here to conclude that the OMA is facially neutral.

Even if a law passes the test of facial neutrality, it is still necessary to ask whether it embodies a more subtle or masked hostility to religion. See, *e.g.*, *Gillette v. United States*, 401 U.S. 437, 452 (1971) (indicating that the Free Exercise Clause "forbids subtle departures from neutrality"); see also *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (noting that the First Amendment prohibits the government from engaging in the "covert suppression of particular religious beliefs"). To answer that question, we must look at available evidence that sheds light on the law's object, including the effect of the law as it is designed to operate, the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act's] legislative or administrative history." *Lukumi*, 508 U.S. at 540. Perhaps the most important of these sources is the remainder of the statute of which the new § 30 is a part. The OMA in its entirety is the law that the Illinois General Assembly passed; by relying on it we do not run the risk of selective use of statements in legislative history that might not reflect the intent of the legislature. The Supreme Court took this approach when it reviewed the Free Exercise and Establishment Clause claims in *Locke v. Davey*, 540 U.S. 712 (2004). There, although the petitioner challenged only the specific statutory provision of a scholarship program that prohibited recipients from pursuing post-secondary degrees in theology, the Court observed that "the *entirety* of the Promise Scholarship Program goes a long way toward including religion in its benefits." *Id.* at 724 (emphasis added).

Although St. John's alleges in its complaint that the City targeted its religious rights when the City asked the Illinois General Assembly to amend IRFRA as part of the OMA, in reviewing the sufficiency of the complaint "we are not obliged to accept as true legal conclusions or unsupported conclusions of fact." *Hickey v. O'Bannon*, 287 F.3d 656, 658 (7th Cir. 2002). There are simply no facts in the voluminous record on appeal that support any such claim of targeting religious institutions or practices. According to its stated purpose, the OMA was enacted, in part, to insure that "legal impediments to the completion of the [O'Hare] project be eliminated." OMA § 5(b). As we noted earlier, most of the OMA's provisions have absolutely nothing to do with religion, cemeteries, or IRFRA. See, *e.g.*, *id.* § 20 (prohibiting local government units, other than the City of Chicago, from condemning property that is slated to become part of O'Hare); *id.* § 94 (amending the Illinois Aeronautics Act, 620 ILCS 5/38.01, to exempt project applications under the provisions of the Airport and Airway Improvement Act submitted in connection with the OMP from the general requirements for such applications); *id.* § 95 (amending the Illinois Code of Civil Procedure to include a quick-take provision for property condemned for the OMP). In fact, the record as a whole strongly supports the position the City has urged throughout these proceedings: the OMA was designed to remove any and all state-law based impediments to the O'Hare expansion project, no matter what their source.

St. John's makes the obvious point that, as matters have developed, it is now the only cemetery in the

State of Illinois affected by the new § 30 of IRFRA. That is true, but an "adverse impact will not always lead to a finding of impermissible targeting." *Lukumi*, 508 U.S. at 535. In fact, if this point matters at all, it may cut in favor of the City. As St. John's repeatedly mentions in its brief, no other religious cemetery in Illinois, including other cemeteries similarly affiliated with the United Church of Christ, is affected by the OMA. The fact that the legislation leaves other religious cemeteries untouched (including those affiliated with churches or other religious institutions that hold similar beliefs with respect to burial grounds) reinforces the proposition that the legislature had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion. If there were ten cemeteries in that area, then the new § 30 would apply to all ten; while there were two, it applied to both. We conclude that the OMA, including the portion that amends IRFRA, is a neutral law of general applicability. The Illinois legislature was entitled to restore Illinois law to the regime governed by *Smith* in order to facilitate the airport project.

Although we think it unnecessary to ask whether the plan passes the strict scrutiny test, and whether the City has shown that it is the least restrictive means of furthering a compelling governmental interest, we add for the sake of completeness that we agree with the FAA's conclusion in the ROD that the plan passes muster. Unlike our dissenting colleague, we see no disputed issues of material fact that would require further proceedings.

Virtually all involved parties, from the competent committee in Congress, to the FAA, to the State of Illinois, to the City of Chicago, have made a compelling case that the OMP addresses a serious problem with national—indeed international—consequences. O'Hare is a vital transportation link for the Midwest region, for North America, and for the world. It is the only airport in the United States that is the hub of two major airlines. Serving 47 scheduled passenger airlines and 23 cargo carriers, O'Hare provides nonstop service to 127 domestic and 48 international destinations. In part because Chicago is the largest population and economic center in the middle of the country, O'Hare "plays an important role in the National Airspace System (NAS) as a dual airline hub, a major mid-continent market for nearly every major airline, and a key international gateway."

O'Hare is not only one of the busiest airports in the world. Unfortunately, recently it has also become one of the most congested. Its delay record is at least twice as bad as that of the next two airports that suffer from excessive delays, Atlanta and Newark. Nearly 70,000 airport operations at O'Hare were delayed in 2004, for a total of almost 4,000,000 minutes. As the OMA states, "The reliability and efficiency of air transportation for residents and businesses in Illinois and other States depend on efficient air traffic operations at O'Hare." 620 ILCS 65/5. Approximately 51% of total passengers traveling through O'Hare connect to and from other airports. As a major international gateway, the effects of the congestion at O'Hare are far-reaching. Delays at O'Hare spark

further delays around the country and the world, with serious economic and logistical consequences. According to the ROD, "O'Hare has consistently been the number one problem related to delays with the National Airspace System in the United States today." Moreover, the problem seems unlikely to abate; the FAA believes that "[a]ir traffic at O'Hare is projected to increase in the future from some 31 million passengers and 922,787 operations in 2002 to some 50 million passengers and 1,194,000 operations by 2018." Many who have tried to connect through O'Hare have learned the hard way that the airport simply lacks the capacity to accommodate all the demand for its services. It is for these reasons that the FAA concluded that the state interests at stake are compelling and agreed to fund one of the largest and most costly reconfigurations of an airport in the United States.

The routes and networks that have developed around O'Hare are vast and entrenched. The FAA considered the option of diverting air traffic to other regional airports or mid-continent hubs, but it found that local, national and international dependence on O'Hare as a national connecting hub and international gateway had developed to the point of making those ideas effectively unworkable. To borrow a concept from the "essential facilities" doctrine in antitrust law, as a practical matter it is impossible reasonably to duplicate O'Hare in a way that meets the crushing demand for its important services. Compare *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983). If the decision were ours to make (a proposition that we find doubtful), rather than that of the FAA or the competent

authorities in Chicago and Illinois, we would find that there really is "no realistic, economically practical alternative," *City of Malden, Missouri v. Union Electric Co.*, 887 F.2d 157, 163 n.6 (8th Cir. 1989), to the restructuring of O'Hare to remedy those concerns. Given O'Hare's unique importance to the national transportation infrastructure, we are persuaded that the City and State have a compelling interest in fixing the problems from which O'Hare suffers.

Even if the need is compelling, if IRFRA applied it would be necessary to decide whether the OMP is the least restrictive alternative. St. John's has offered no plausible evidence to suggest that it is not. See *Bell Atlantic*, 127 S. Ct. at 1974. The City and its many partners carefully considered the concerns of the religious entities in an exhaustive review. They studied the alternatives thoughtfully, adopted some of them, and came up with a final plan that represents the City's best effort to be solicitous of the religious concerns involved without substantially undermining the goals of the overall project. See *Bensenville*, 457 F.3d at 72 (stating that the FAA "appears to have acted with great care in conducting its analyses for the EIS and ROD" in this case). Cf. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453-55 (1988) (noting that where the government commissioned a comprehensive study of the effects its proposed road would have on the religious concerns at issue and had planned numerous ameliorative measures to mitigate the intrusion as much as possible, "it is difficult to see how the Government could have been more solicitous"). The City discarded

its original plan to relocate air cargo facilities to the Rest Haven site, after the FAA concluded that "there is a measure of flexibility in the design and location of these buildings sufficient to accommodate the religious liberty interests without impeding the air cargo component" of the overall plan. Accordingly, Rest Haven was spared in an effort to tailor the plan in as accommodating a manner as possible.

Unfortunately, geography and the needs of the expansion project made it impossible similarly to accommodate the St. Johannes cemetery. The FAA's review of alternative proposals illustrates, however, that this conclusion was not reached lightly. The proposals attempted to minimize encroachment on the St. Johannes cemetery as much as possible by considering options that would have shifted, shortened, or eliminated various runways or other parts of the overall plan. For example, one alternative called for moving a key runway about 400 feet to the south and shortening it to avoid the St. Johannes cemetery. The FAA found that doing so would have moved the runway into protected space for a new air control tower that could not be moved without running afoul of FAA safety standards. According to the ROD, the ultimate result would have "compromis[ed] the efficiency and capacity of [other] runways in poor weather." The ROD noted that the responses to these concerns "demonstrate [d] an unfamiliarity with the real-world situation of operating a major airport in both a safe and efficient manner." Another proposal suggested simply shortening the runway without moving it to another part of the airport. The FAA found that this

alternative would "place severe operating constraints on the airfield any time weather conditions presented a ceiling below 4,500 feet and less than 7 miles of visibility" which "would not accommodate anticipated growth in aviation activity at acceptable levels of delay."

More creative possibilities were considered as well, such as simply constructing a necessary runway on the surface of the cemetery ground without disturbing the bodies underneath. Even though this would have made access to and future use of the cemetery impossible and may also have offended religious sensibilities, some thought that this proposal was less restrictive because the bodies would remain untouched. The FAA consulted the Tennessee Valley Authority, a federal agency with considerable experience in cemetery relocation (derived over many years of building hydropower facilities in areas where cemeteries were located), about this idea. The concept proved to be infeasible as a matter of engineering. The FAA concluded that "the depth of excavation needed for runway construction, along with the ancillary activities such as electrical cabling for airfield runway lighting and storm sewer pipes for airfield drainage, presented a substantial likelihood that the graves could be disturbed."

It is significant that this case involves physical intrusion on a religious site, not the curtailment or prohibition of a religious practice. The least restrictive alternative analysis here comes down to concrete measurements. The question is whether there is a way to construct the vitally needed new runways and

supporting structures at O'Hare—a defined physical space—in a way that limits or avoids entirely physical encroachment on an adjacent geographical area. An airport layout and runway configuration is an intricate web of interrelated parts where placements and measurements are carefully calibrated to account for variables such as wake turbulence, weather, and visibility, as well as the size, speed, and schedules of departing and arriving aircraft. The entire project is constrained by demanding FAA standards. As the ROD explains, "a change in one runway often has consequences for other runways, nearby taxiways, and the overall ability to handle greater levels of traffic." Each alternative proposal fell victim to that reality. The City has demonstrated that it has accommodated the religious concerns as much as is physically possible without compromising its compelling interests. The only plausible conclusion that the pleadings support is that the OMP represents the least restrictive alternative.

Lastly, St. John's argues that the district court erred in concluding that in order to state a free exercise claim a plaintiff must allege two things: (1) that the defendant's actions were motivated by animus or prejudice, and (2) that the law at issue is not neutral or of general applicability. The first of these, it asserts, is precluded by cases such as *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132 (10th Cir. 2006). There, the Tenth Circuit observed that "the Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of

hostility or prejudice, but for secular reasons." *Id.* at 1144.

With respect, we think that St. John's has misread the district court's opinion. Only after the court decided that the OMA was a neutral law of general applicability did it observe that "none of the allegations in the complaint give[s] rise to the inference that the facially neutral language masks more insidious underpinnings." This comment reflects the inquiry required by *Lukumi.* The district court was not suggesting that a plaintiff is *required* to allege animus or prejudice in order to state a free exercise claim.

In fact, a closer look at *Shrum* reveals that it is not of much help to St. John's. In that case, the plaintiff, a police officer and minister, alleged that he was assigned to a day shift precisely because this schedule would conflict with his ministerial duties. Although the defendant gave a neutral justification for the assignment, the plaintiff's allegation was that the decision to reassign him was "motivated by [plaintiff]'s religious commitments." *Id.* at 1144. A question therefore existed with respect to whether the decision at issue was actually neutral and of general applicability; the court had no need to require the plaintiff also to allege that the assigning officer had held his faith against him or had acted out of religious prejudice. The problem was that the assigning officer wanted to force the plaintiff to choose between his duties as a police officer and his post as a minister and "religious discrimination was the means to [that] entirely secular end . . . ." *Id.* Here, in contrast, St. John's does not allege that the City is seeking to

acquire its land *because* of its religious significance; the City needs the land *in spite of* its current dedication to religious use. *Cf. Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (" 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (internal citation omitted). There are no facts in this record that could support such a claim.

V

Moving on from its free exercise challenge to the OMA's amendment of IRFRA, St. John's argues that the OMA violated the Fourteenth Amendment's Equal Protection Clause when it deprived St. John's of constitutional and statutory legal protections that are available to every other cemetery in the state. The district court dismissed this aspect of the case, in both the original and the second amended complaint, for failure to state a claim upon which relief could be granted. The court's error in this respect, according to St. John's, was its failure to review the equal protection theory using strict scrutiny.

In deciding whether the OMA violates the Equal Protection Clause, our first question is whether the act targets a suspect class or addresses a fundamental right. See *Eby-Brown Co., LLC v. Wisc. Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002). If it does either of these things, then the legislation must survive more

demanding scrutiny. Normally, this means that it must be tailored narrowly to facilitate a compelling state interest. See *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000). If no fundamental rights or suspect categories are at issue, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

St. John's first tries to repackage its free exercise argument in equal protection language, by claiming that the new § 30 unduly burdens its fundamental right freely to exercise its religion. We have already rejected the underlying point, however. "Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts." *Wirzburger v. Galvin*, 412 F.3d 271, 282-83 (1st Cir. 2005) (citing *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974)).

St. John's also argues that the new § 30 targets a suspect class, namely, the two religious cemeteries adjacent to O'Hare. It has not fleshed out this argument particularly well. If it means to suggest that "cemeteries adjacent to O'Hare" constitute a constitutionally suspect class, we must disagree with it. A suspect class either "possesses an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), or is one "saddled with such disabilities, or

subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Although religion may fit the bill, see, *e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), strict scrutiny has been reserved for laws that "discriminat[e] among religions." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The new § 30 neither classifies on the basis of religion nor discriminates among religions.

Once again, St. John's notes that it is the only religious cemetery currently affected by the OMA; other religious cemeteries in the state, including those affiliated with the United Church of Christ, are beyond the statute's reach. As was the case with respect to its free exercise claim, St. John's own argument proves that this statute does not treat St. John's differently from other religious cemeteries in the state *because* it is a religious cemetery. Rather the statute puts St. John's in a different position from other religious cemeteries in the state because it is near O'Hare and, unlike the Rest Haven Cemetery, the City badly needs the land to construct additional runways. Geography, however, is not a suspect class for equal protection purposes. If St. John's is attempting to state a "class of one" equal protection claim, see *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), it has failed to do so. This court has held that "[a] class of one equal protection claim may be brought where (1) the plaintiff

alleges that he has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment or the cause of the differential treatment is a 'totally illegitimate animus' toward the plaintiff by the defendant." *Lunini v. Grayeb*, 395 F.3d 761, 768 (7th Cir. 2005) (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004)). Even if St. John's could satisfy the first part of that test, it cannot survive the second part.

The fact that this statute affects a religious group or institution does not necessarily mean that the statute classifies on the basis of religion. See, *e.g., Johnson*, 415 U.S. at 375 n.14 (declining to categorize group of religious conscientious objectors as a suspect class); *Locke*, 540 U.S. at 712 (applying rational basis review to a statute that prohibited state aid to any post-secondary student pursuing a degree in theology). As we observed earlier, in a case like this, where a facially neutral statute is challenged on equal protection grounds, the challenger must prove that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279. Nothing supports the proposition that the Illinois legislature singled out St. John's for lesser protection under IRFRA protection *because* it runs a religious cemetery. Anyone or anything standing in the way of the O'Hare project faces the prospect of the City's exercise of its eminent domain power. We have no doubt that the legislature was unmoved by St. John's religious affiliation.

In order to survive a motion to dismiss for failure to state an equal protection claim, "a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992). As the district court observed, St. John's does not even attempt to argue that the OMA's amendment to IRFRA is not rationally related to some legitimate government purpose. Certainly, the expansion of O'Hare is a legitimate state purpose. As a classic "public use"—an airport to be operated by the City of Chicago for the benefit of local, national, and international transportation—it does not raise any of the questions that concerned the dissenting Justices in the Supreme Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005). Enacting a statute that removes legal barriers to the City's ability to acquire land in connection with the expansion of the airport is not "wholly impossible" to relate to that legitimate interest. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 766 (7th Cir. 2003).

VI

Last, St. John's invokes the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, *et seq.* Congress enacted RLUIPA after the Supreme Court invalidated the federal RFRA, 42 U.S.C. § 2000bb, *et seq.*, as it applied to the states and their subdivisions in *City of Boerne*, 521 U.S. 507. "Less sweeping" than RFRA, RLUIPA is limited to cases involving land use regulations or the religious exercise rights of institutionalized persons. It applies when a substantial burden to religious exercise is

"imposed in a program or activity that receives Federal financial assistance," affects interstate commerce, or, in a case involving a land use regulation, is imposed pursuant to a procedure that permits the government to make "individualized assessments of the proposed uses for the property involved." 42 U.S.C. §§ 2000cc1(b)(1)-(2), 2000cc(a)(2)(A)-(C).

The question before us is whether the "land use" part of RLUIPA applies here. That part of the statute prohibits any government from implementing a "land use regulation" that "imposes a substantial burden on the religious exercise of a person," as well as on religious assemblies and other religious institutions, unless the government can show that the "imposition of the burden on that person, assembly, or institution is in furtherance of a compelling governmental interest [ ] and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). We must decide whether the City's plan to condemn the St. Johannes Cemetery is a "land use regulation" within the meaning of RLUIPA. We agree with the district court's conclusion that it is not.

Initially, we note that we are proceeding on the assumption that RLUIPA as a whole does constitutionally apply to the states. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court held that § 3 of RLUIPA, which deals with the religious exercise rights of institutionalized persons, is constitutional as applied to the states. The Court specifically declined to express any view on the validity of § 2 of the statute, which deals with land use regulations. 544 U.S. at 715 n.3. Neither party has

raised any challenges to the constitutionality of § 2; because we conclude that the statute does not apply here, we save for another day the question whether this part of the statute may be applied to the states.

The term "land use regulation" is defined by RLUIPA as follows:

> [A] zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

42 U.S.C. § 2000cc-5(5). St. John's (as well as the Municipal Plaintiffs and Rest Haven, for that matter) have not objected, however, to any plan on the City's part to zone their property in an unfavorable way or to impose restrictions on it under a landmarking law. St. John's claims instead that the OMA is a "zoning-type law" because it changes the permitted use of its land from a religious cemetery to land designated as "airport property." But this is a misleadingly incomplete description of the City's intentions under the statute. The fact that the OMA refers to the land it seeks to acquire from everyone living within the footprint of the O'Hare expansion project as "airport property" does not morph the OMA into a zoning ordinance. The City is not attempting to dictate to these plaintiffs what they are permitted to do with the plot of land that is currently the St. Johannes Cemetery; rather, the City seeks to exercise its takings

power to assume full ownership of the land, after paying St. John's just compensation. As Illinois courts have long recognized, the "police power [zoning] and eminent domain are distinct powers of government." *Sanitary Dist. of Chi. v. Chi. & Alton R.R. Co.*, 108 N.E. 312, 314 (Ill. 1915) ("Whatever restraints the Legislature imposes upon the use and enjoyment of property with the reason and principle of this duty the owner must submit to. It is a regulation, and not a taking; an exercise of police power, and not of eminent domain."). Because zoning and eminent domain are "two distinct concepts" that involve land "in very different ways," we reject the argument that the City's plan to condemn the St. Johannes Cemetery under the OMA is an act of zoning. *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005).[3]

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[3] Some argue that the two concepts are not so distinct, and that the problem with zoning is that it forces property owners to limit the uses to which they put their property. In that sense, the argument goes, zoning regulations are in fact partial takings of private property. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 100-03 (1985).

Professor Epstein argues that what government should do in lieu of zoning is use its power of eminent domain, assuming of course that there is a valid public purpose and the government is willing to pay. He recognizes that the law has not adopted his theory, however, noting that "the dominant line of opinion—one that can be traced to Justice Holmes in [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)]—is that regulation, far from being a subclass of takings, is outside the scope of the eminent domain clause unless it is taken 'too far.'" *Id.* at 102.

St. John's argument runs in the other direction; it claims that the exercise of eminent domain in this case has essentially zoned

St. John's relies on a district court case from the Southern District of Indiana for the sweeping proposition that "[w]hen an ordinance constitutes an attempt by the government to regulate the use of a piece of property, it is an act of zoning." *Sagamore Park v. City of Indianapolis*, 885 F. Supp. 1146, 1150 (S.D. Ind. 1994). That decision, however, is inapposite. It addressed the question whether a moratorium imposed by the Board of Zoning Appeals amounted to an act of zoning; it had nothing to do with the question whether an exercise of the sovereign power of eminent domain should also be regarded as "zoning."

In addition to arguing that the OMA is a zoning law, the Plaintiffs contend that eminent domain itself is a "land use" regulation under RLUIPA. Their best authority for this point is a footnote in a district court case from the Central District of California, *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). Briefly, in that case, the plaintiff, Cotton-wood Christian Center, wanted to build a church on an 18-acre parcel of land that it owned. The City of Cypress planned to use that land for commercial retail space and initiated eminent domain proceedings. The plaintiff brought an action for a preliminary injunction after the City denied it the necessary land use permit it needed to begin

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away its entire property. But the City has paid just compensation for what it has taken in this case, which is exactly what distinguishes it from a zoning regulation that has gone "too far." It would strain the statutory definition beyond repair to equate a buy-out with a "limitation" or "restriction" on land use.

constructing its place of worship. The district court found that the City's refusal to grant Cottonwood's application for a conditional use permit was a land use regulation subject to RLUIPA. In a footnote, the court commented that "[e]ven if [it] were only considering the condemnation proceedings, they would fall under RLUIPA's land use regulation." *Cottonwood*, 218 F. Supp. 2d at 1222 n.9.

We are not persuaded by the district court's brief dicta in *Cottonwood* that eminent domain is always and inevitably a land use regulation under RLUIPA. Given the importance of eminent domain as a governmental power affecting land use, we think that if Congress had wanted to include eminent domain within RLUIPA, it would have said something. Indeed, before federal law (even under the Spending Clause) starts interfering with the fundamental state power of eminent domain, it is likely that we would need a clear statement from Congress. See, *e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotation omitted). Congress did not mention eminent domain in so many words in RLUIPA's definition of a land use regulation, which is enough for us to consider it excluded. See *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that where the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms."). The handful of federal and state cases that have addressed

this question have reached the same conclusion that we have. See, *e.g.*, *Faith Temple Church*, 405 F. Supp. 2d at 255 ("By its terms . . . RLUIPA does not apply to eminent domain proceedings."); *City and County of Honolulu v. Sherman*, 129 P.3d 542, 547 (Haw. 2006) ("RLUIPA is not available as a defense to condemnation . . . ."); see also *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 434 (6th Cir. 2002) (although not specifically addressing the question whether condemnation is a land use regulation under RLUIPA, indicating that the City's property interest in the land at issue gave it the right to develop the land as it desired and thus the City's decision to develop the roadway was not based on any zoning or landmarking law). Because this case does not involve a "land use regulation," there is no need for us to address RLUIPA's other element—whether the City's proposed actions will substantially burden Plaintiffs' religious exercise.

With RLUIPA inapplicable, we have exhausted the possible reasons why the St. Johannes Cemetery might be exempt from the City's general eminent domain power. Over the years, Illinois has condemned cemeteries, both religious and otherwise, for a variety of public uses, such as highways. See, *e.g.*, *Illinois State Toll Highway Comm'n v. Eden Cemetery Ass'n*, 158 N.E.2d 766 (Ill. 1956) (oft-cited case about the appropriate uses of the state's eminent domain power involving condemnation of a religious cemetery); *Dep't of Transp. v. Bouy*, 386 N.E.2d 1163 (Ill. App. Ct. 1979) (resolving methods government was required to use to determine the market value and appropriate

compensation for the partial taking of a cemetery to provide land for a highway). We recognize that relocating St. Johannes will be a sensitive and labor intensive task. The City has established a detailed protocol, which includes identifying the next of kin for each person buried at the cemetery and hiring professional archaeologists and a licensed funeral director to carry out archaeological work and disinterments for each person buried there. At oral argument, the City assured us that it will comply with these procedures. We take the City at its word and trust that this process will be carried out with dignity and respect for both living and dead. Of course, the plaintiffs remain free to challenge any deviation from the City's proposed methods of relocation before an appropriate tribunal should some controversy arise in the future.

Given our conclusion that none of St. John's religious claims against the City survives, the district court was correct to deny its motion for a preliminary injunction.

VII

Accordingly, we AFFIRM the judgment of the district court.

RIPPLE, Circuit Judge, concurring in part and dissenting in part. I join my colleagues in affirming the judgment of the district court with respect to the claims by Rest Haven and the municipal defendants. However, I believe that the amendments to the Illinois

Religious Freedom Restoration Act ("Illinois RFRA") made in the O'Hare Modernization Act ("OMA"), Ill. Pub. Act No. 093-0450, violate the Free Exercise Clause, and, for that reason, must be subject to strict scrutiny. I further believe that there remain factual questions regarding whether the City of Chicago ("City") has shown that the proposed modernization and expansion plan of O'Hare Airport is narrowly tailored to meet the compelling interest the City claims. These factual issues render dismissal inappropriate at this stage in the litigation. Therefore, I respectfully dissent.

I
BACKGROUND

The majority's thoughtful and comprehensive opinion sets forth the facts of this case in great detail; therefore, I shall provide only a brief description of the pertinent facts.

In May 2003, the Illinois General Assembly enacted the OMA. The legislation amended various provisions of Illinois law to facilitate the planned expansion of O'Hare Airport. One of the legal impediments that this legislation sought to remove was a restriction on the power of the City to condemn particular properties for the expansion, including two religiously-affiliated cemeteries, one of which, St. Johannes Cemetery ("St. Johannes"), is owned by St. John's United Church of Christ ("St. John's"). Among the changes aimed at facilitating the condemnation of these cemeteries was an amendment to the Illinois RFRA that repealed otherwise generally applicable statutes only with

respect to the relocation of cemeteries in connection with the O'Hare expansion.

St. John's and two of its congregants[1] filed this action, challenging both the City's attempt to acquire the land on which St. Johannes is located and the amendment to the Illinois RFRA. St. John's asserted that the City's actions violated its rights under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[2] St. John's maintains that the relocation of St. Johannes would violate a major tenet of its religious beliefs, which requires that those buried in St. Johannes must remain undisturbed until resurrected by Jesus Christ on the Last Day. St. John's further contended that, because the amendments to the Illinois RFRA singled out religious cemeteries near O'Hare, the law was not neutral and of general applicability, and therefore subject to strict scrutiny under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The district court dismissed St. John's complaint for failure to state a claim. The district court concluded

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[1] Because the congregants assert the same claims as St. John's, I shall refer, for ease of reference, to the plaintiffs collectively as St. John's.

[2] The owner of the second cemetery, Rest Haven Cemetery Association, originally joined St. John's in these claims. As noted by the majority opinion, the City no longer seeks to acquire the land on which Rest Haven is located, rendering Rest Haven's challenges moot.

that the OMA was a neutral law of general applicability; thus, it was subject only to rational basis scrutiny under both the Free Exercise Clause and the Equal Protection Clause.

II
DISCUSSION

The First Amendment ensures religious freedom by firmly committing the state to a position of neutrality in the relationship between individuals and religion. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963). The Supreme Court has observed that, with respect to religious freedom, the principle of government neutrality, the government "protect[s] all, it prefers not, and it *disparages* none." *Id.* at 215 (quoting *Minor v. Bd. of Educ. of Cincinnati* (Super. Ct. of Cincinnati, February 1870) (Taft, J., dissenting) (unpublished case), reproduced in *The Bible in the Common Schools* (Robert Clark & Co. ed., 1870)). The Free Exercise Clause advances the command of government neutrality by securing "religious liberty in the *individual* by prohibiting any invasions thereof by civil authority" and protecting against the coercive effect of legislation "as it operates against him in the practice of his religion." *Schempp*, 374 U.S. at 223 (emphasis added); *see also Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 384 (1990); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 996 (7th Cir. 2006). At a minimum, the Free Exercise Clause protects against laws that "discriminate[ ] against some or all religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

State action that offends the Free Exercise Clause must satisfy strict scrutiny, i.e., be narrowly tailored to serve a compelling state interest. *See Vision Church*, 468 F.3d at 996; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 763 (7th Cir. 2003). Additionally, when a legislative classification offends a fundamental right, such as the Free Exercise Clause, an equal protection challenge to that classification is subject to strict scrutiny. *Vision Church*, 468 F.3d at 1000. A law offends the Free Exercise Clause and its requirement of government neutrality with respect to religion in two circumstances. First, a law that burdens the free exercise of religion and that is not facially neutral and of general applicability will be subject to strict scrutiny. *City of Hialeah*, 508 U.S. at 531-32; *Vision Church*, 468 F.3d at 996. Second, a facially-neutral law that "imposes a substantial burden on religion" offends the Free Exercise Clause and likewise is subject to strict scrutiny. *Vision Church*, 468 F.3d at 996. The OMA's amendment to the Illinois RFRA violates the Free Exercise Clause under either of these approaches.

A law is not neutral on its face if its object or purpose "is the suppression of religion *or religious conduct*." *City of Hialeah*, 508 U.S. at 533 (emphasis added). To determine whether a law is neutral and of general applicability, we first look to the text of the statute to determine whether it discriminates on its face. *Id.* "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from language or context." *Id.* Applying these standards, it is clear that the OMA's amendment to the Illinois

RFRA is not facially neutral. OMA added a new section 30 to the Illinois RFRA which reads:

> Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein.

775 ILCS 35/30. The panel opinion determines that, because cemeteries and the burial, or relocation, of the dead are not inherently religious, the amendment to the Illinois RFRA is textually neutral. However, this analysis fails to appreciate that, when read in context, the new section 30 of the Illinois RFRA affects only religious cemeteries. The phrase "this Act" in the new section 30 refers to the Illinois RFRA. *See id.* 35/1. The Illinois RFRA, in turn, protects against government actions that substantially burden an individual's free exercise of religion, *id.* 35/15, which the Illinois RFRA defines as "an act or refusal to act that is substantially motivated by religious belief, *id.* 35/5. Thus, the *only* cemeteries affected by OMA's amendment to the Illinois RFRA are those *religious* cemeteries that the City may seek to relocate. Moreover, because the Illinois RFRA's protections apply only where the government action substantially burdens an individual's free exercise of religion, the amendment affects only those religious cemeteries whose relocation would substantially burden an individual's free exercise of religion.

The effect of the amendment is to remove from the protections afforded to every other individual's

religious observance, those individuals whose religious practices would be substantially burdened by the relocation of cemeteries in connection with the expansion of O'Hare. The OMA amendment to the Illinois RFRA offends the Free Exercise Clause by penalizing those individuals whose religious observance is affected by the expansion project by denying them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Illinois RFRA demands that the government show a compelling interest and the lack of viable alternative before it burdens anyone's religious beliefs. By the amendment, Illinois has watered down, significantly, the protection afforded these plaintiffs. It does not matter that Illinois has not chosen to single out the United Church of Christ (the faith with which St. John's is affiliated) for unfavorable treatment across the state. The Free Exercise Clause protects the *individual's* right to the free exercise of religion. *See Jimmy Swaggart Ministries*, 493 U.S. at 384; *Schempp*, 374 U.S. at 223. Thus, the OMA's amendment to the Illinois RFRA both burdens the free exercise of religion and lacks facial neutrality, and, therefore, strict scrutiny must be applied to the amendment.

However, even if the amendment to the OMA was facially neutral, it would still be subject to strict scrutiny because it imposes a substantial burden on religion. As the Supreme Court said in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993):

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971) and "covert suppression of particular religious beliefs," *Bowen v. Roy*, *supra*, at 702 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

See also Vision Church, 468 F.3d at 996. We have held that a burden on the free exercise of religion rises to the level of a constitutional injury when the law places significant pressure on the adherent to forego its religious precepts. *Id.* at 999. The effect of relocating St. Johannes on St. John's religious observance is neither hypothetical nor speculative, but, rather, inescapable. The relocation of St. Johannes would force St. John's to forego its religious precepts regarding the burial of its members. This burden goes further than placing pressure on St. John's to forego its religious precepts. By relocating St. Johannes Cemetery, St. John's would be "coerced by the Government's action into violating [its] religious beliefs." *Lyng*, 485 U.S. at 449. By forcing St. John's to "perform acts undeniably at odds with fundamental tenets of [its] religious beliefs," this coercion presents the precise "danger to the free exercise of religion that the First Amendment was designed to prevent." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Because the amendments to the Illinois RFRA offend the Free Exercise Clause, the law must survive strict scrutiny under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Under strict scrutiny review, the Government bears the burden of proving both that the act in question advances a compelling state interest and that the means chosen to pursue that interest are narrowly tailored to that end. *See Johnson v. California*, 543 U.S. 499, 505 (2005); *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006); *Vision Church*, 468 F.3d at 996. The majority opinion accepts the City's assertions that the current modernization plan is narrowly tailored. Perhaps the City is correct. However, accepting the City's assertions at this stage in the litigation is inconsistent with our obligation when reviewing a motion to dismiss to accept all well pleaded facts as true and draw all reasonable inferences from those facts in favor of the plaintiffs. *Patel v. City of Chicago*, 383 F.3d 569, 572 (7th Cir. 2004). At this stage in the litigation, there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here.

Therefore, I would remand the case for further proceedings to allow factual development. For these reasons, I respectfully dissent from the portion of the panel's opinion that rejects St. John's claim. I am pleased to join the opinion in all other respects.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ST. JOHN'S UNITED CHURCH OF CHRIST, an Illinois not-for-profit corporation; HELEN RUNGE; SHIRLEY STEELE; REST HAVEN CEMETERY ASSOCIATION, an Illinois not-for-profit corporation; ROBERT PLACEK; LEROY H. HEINRICH; VILLAGE OF BENSENVILLE, ILLINOIS, an Illinois municipal corporation; ROXANNE MITCHELL; and the VILLAGE OF ELK GROVE, ILLINOIS, an Illinois municipal corporation,

Plaintiffs,

v.

THE CITY OF CHICAGO, an Illinois municipal corporation; RICHARD M. DALEY, Mayor of the City of Chicago; FEDERAL AVIATION ADMINISTRATION; MARION C. BLAKEY, Administrator of the Federal Aviation Administration; the STATE OF ILLINOIS; and ROD R. BLAGOJEVICH, Governor of the State of Illinois.

Defendant.

No. 03 C 3726
HONORABLE DAVID H. COAR

MEMORANDUM OPINION AND ORDER

Before this Court is a host of motions filed by Plaintiffs and Defendants in this case, as well as their responses to this Court's rule to show cause.

Plaintiffs' motion to file a proposed second Amended Complaint is DENIED with respect to Counts I through X but GRANTED with respect to Count XI. Given that no unique counts remain in the first Amended Complaint that overcome the problems raised by this Court in its show cause order and in this opinion, Plaintiffs' first Amended Complaint is DISMISSED. The TRO is VACATED. Based on the actions in this opinion, Plaintiff's motion for a preliminary injunction is DENIED as MOOT.

Factual and Procedural Background[1]

This case is one skirmish in a series of battles between those who support the expansion of O'Hare International Airport and those who do not. At the inception of this litigation, plaintiffs included the villages of Elk Grove and Bensenville ("the Municipal Plaintiffs"); St. John's United Church of Christ and two parishioners named Shirley Steele and Helen Runge ("the St. John's Plaintiffs"); and Rest Haven Cemetery Association and two members of its board of directors

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[1] For the purpose of this opinion, all facts alleged by Plaintiffs in their proposed Seconded Amended Complaint are assumed to be true. This Court also takes judicial notice of the proceedings in *Village of Bensenville et al. v. FAA*, No. 5-1383 (D.C. Cir. filed Sept. 30, 2005).

Leroy Heinrich and Robert Placed ("the Rest Haven Plaintiffs"). These plaintiffs sued the City of Chicago ("City" or "Chicago") and Mayor Richard M. Daley; the State of Illinois and Governor Rod R. Blagojevich; and the Federal Aviation Administration and Administrator Marion Blakey (collectively referred to as "FAA") based on allegations arising from the Defendant's involvement in plans to expand O'Hare. Plaintiffs alleged that the City planned to build runways on land currently located in Bensenville and Elk Grove, including land currently used by St. Johannes Cemetery, the cemetery affiliated with St. John's, and land used by Rest Haven Cemetery.

This is not, of course, the first time that critics have opposed expansion of O'Hare. Nor is this the first time that Bensenville and Elk Grove Village have filed suit to ward off expansion. In 1974, for example, the two municipalities were part of a group called the Suburban O'Hare Commission ("Suburban") that intervened in litigation alleging that the FAA had violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq. by adopting a policy of unlimited growth at O'Hare. *See Suburban O'Hare Comm'n et al. v. Dole*, 787 F.2d 186, 188-89 (7th Cir. 1986) (citing *State of Illinois ex rel. Scott v. Butterfield*, No. 74-2440 (N.D. Ill. 1974). The litigation ended on October 15, 1982, when the FAA, the City, and Suburban entered into a consent decree that governed the future growth of O'Hare. *Id.*

Roughly two years later, Suburban filed a separate suit against the FAA and the City in district court, alleging that the approval of a proposed airport layout

plan (or "ALP") violated the consent decree; NEPA; the Airway and Airport Improvement Act ("AAIA"), and the Clean Air Act, 42 U.S.C. §§7401 et seq. *Id.* at 192. Prior to the district court's dismissal of the suit, Suburban filed a petition for review in the Seventh Circuit. Suburban argued at the time that the FAA's order approving the ALP could only be reviewed in district court. The Seventh Circuit disagreed, finding exclusive jurisdiction in the courts of appeals. *See id.* at 195.

The current litigation stems from Chicago's most recent efforts to expand O'Hare; efforts that compose what Mayor Daley termed the "O'Hare Modernization Project" ("OMP"). The OMP, made public in July 2001, includes plans for building new runways. In a attempt to garner support for the OMP, Chicago claimed that by building new runways, it could more than double O'Hare's capacity for boarding passengers and reduce flight delays by 79% overall. These and other claims regarding the OMP were based on material affirmative misstatements and knowing omissions or concealment of facts.

When he announced his plans for O'Hare expansion, the Mayor noted that it would be necessary for the City to acquire land in Elk Grove Village and Bensenville—including St. Johannes Cemetery land and Rest Haven Cemetery land—so that the new runways could be constructed. In June 2002, Chicago announced that it would begin efforts to acquire several parcels of land in Elk Grove and Bensenville, including homes, businesses, park land, and St. Johannes and Resthaven. In response, the municipalities filed suit in

state court. They requested an injunction barring Chicago from proceeding with the acquisition before obtaining a "certificate of approval" from the Illinois Department of Transportation ("IDOT") pursuant to 620 ILCS 5/47. In support of their request, they argued that any ultimate decision to protect parcels of land from acquisition would be meaningless if acquisition and demolition had already occurred. On July 9, 2002, an Illinois Circuit Court enjoined Chicago from taking any steps to acquire any property in the two municipalities unless it first obtained a certificate of approval from DOT. The decision was affirmed by the Illinois Appellate Court in *Philip v. Daley*, 790 N.E.2d 961 (Ill.App.Ct. 2003).

According to Plaintiffs, Chicago "clearly did not like" the state laws that enabled Plaintiffs to receive an injunction. It requested that the Illinois General Assembly pass the O'Hare Modernization Act (the "OMA"), which amended the Illinois Religious Freedom Restoration Act to state that "[n]othing in this act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein." The legislature complied with the request and passed the OMA in May 2003.[2] The City of Chicago also requested FAA approval of its proposed "airport layout plan" ("ALP"), pursuant to 49 U.S.C.

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[2] Plaintiffs allege that Governor Blagojevich signed the law on August 6, 2003.

§47107(a)(16).[3]

In response to the enactment of the OMA, the Municipal Plaintiffs, the St. John's Plaintiffs, and the Rest Haven Plaintiffs filed suit in this Court on May 30, 2003. They originally filed suit against the City and Mayor Daley, the state and Governor Rod Blagojevich, and the FAA and administrator Marion Blakey. Plaintiffs then filed an amended 21-count amended complaint on June 19, 2003. Many of their claims hinged on the fact that Chicago was proposing to acquire the land before the FAA had issued an Environmental Impact Statement or a Record of Decision.

In the amended complaint, all the named plaintiffs alleged that Chicago and Mayor Daley had violated NEPA and its implementing regulations; the National Historic Preservation Act (NHPA), 16 U.S.C. §470 et seq. and its implementing regulations; and §4(f) of the Department of Transportation Act, 49 U.S.C. §303(c). They also claimed that by allowing violations of those statutes, the FAA and Blakey had violated the Administrative Procedures Act, 5 U.S.C. §706.

In addition to those claims, the St. John's and Rest Haven Plaintiffs filed several claims based on religion. Against the City and Mayor Daley, they alleged

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[3] The FAA's approval of an ALP constitutes a finding that the ALP is eligible for federal funding. *City of Cleveland, Ohio v. City of Brook Park Ohio*, 893 F.Supp. 742, (N.D.Ohio, 1995) (citing *City of Grapevine, Tex. v. Department of Transportation*, 17 F.3d 1502, 1503 (D.C.Cir. 1994) and *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C.Cir. 1991)).

violations of the Free Exercise Clause of the First Amendment of the United States Constitution (both for targeting Plaintiffs and for placing a substantial burden on Plaintiffs' religious beliefs and practices—see Counts IV and XII); violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (both for discriminating against Plaintiffs and for hiding data that had been shared with other parties—see Counts XVIII and XXI); violations of the Fifth Amendment Takings Clause of the United States Constitution (see Count XX); and violations of the Due Process Clause (see Count XX). These plaintiffs also alleged that Chicago and Mayor Daley violated RLUIPA (see Count VIII).

As for the FAA and Blakey, the St. John's and Rest Haven Plaintiffs alleged that the federal defendants violated the Free Exercise Clause (see count XVI); the Due Process Clause and the Equal Protection Clause (see Count XXI); and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb et seq. (Count XVI).

The St. John's and Rest Haven Plaintiffs also alleged that the State of Illinois and Governor Blagojevich violated the Free Exercise Clause (see Counts VI and XII); the Equal Protection Clause (see Count XIX); and RLUIPA, 42 U.S.C. §2000cc et seq.(see Count X).

On July 10, 2003, the parties entered into an agreed order stating that "The City of Chicago agrees that City voluntarily agrees that it will not acquire property in the Village of Bensenville and Elk Grove Village for the OMP, or acquire Rest Haven or St. Johannes

Cemeteries, unless and until the FAA has issued a Record of Decision following completion of an EIS [environmental impact statement] for the OMP."

Sometime after December 2003, Chicago sought FAA approval and authorization for over $1.3 billion in federal funding for the portion of the OMP termed "Phase One," including approximately $300 million in "airport improvement program" ("AIP") discretionary funds, $63 million in entitlement funds, and an excess of $1 billion in Passenger Facility Charge ("PFC") funds.

In January 2005, the FAA announced that it would prepare a single environmental impact statement—a document required by NEPA—to accompany both the request for ALP approval and the request for funding. The EIS serves as a basis for the FAA's eventual "Record of Decision" ("ROD") on a specific topic.

In late July 2005, the FAA issued its final EIS. In that document, the FAA compared the environmental impact of Chicago's proposal with other alternatives. The FAA concluded that the alternative proposed by Chicago—with some refinement—was the preferred alternative. The EIS included a comprehensive review of the legal issues raised by the St. John's Plaintiffs and Rest Haven Plaintiffs. The FAA noted that if the preferred alternative and refinements were approved in the ROD and the City decided to implement the revised proposal with the aid of federal funding, St. Johannes would be relocated while Rest Haven would not.

On September 30, 2005, the FAA issued a ROD

granting Chicago's request for ALP approval. In the ROD, the FAA went through an extensive analysis of the claims related to religion filed by the St. John's Plaintiffs and the Rest Haven Plaintiffs. The agency noted that it had hoped at the beginning its review of the ALP that the "difficult and sensitive issues involving potential cemetery relocation could be resolved in a collaborative and consensual manner," but after "extensive correspondence, a succession of meetings, and pending litigation, the FAA clearly understands that there remains strong opposition by the religious objectors to relocation of graves from St. Johannes Cemetery and preservation of Rest Haven Cemetery as proposed in the Final EIS." ROD at 91. The FAA reviewed the RFRA claims and concluded that while the acquisition and relocation of St. Johannes Cemetery was likely to substantially burden the exercise of religion, there was a compelling government interest in taking immediate federal action to addresses the aviation needs of the Chicago region by reducing delays at O'Hare.[4]

That same day, the Municipal Plaintiffs and the St. John's Plaintiffs filed suit in the District of Columbia Court of Appeals, pursuant to 49 U.S.C. §46110. As part of that litigation, Plaintiffs filed a

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[4] In the EIS, the FAA noted that in 2003, a total of one-third of the delays for the twenty most delayed airports in the National Airport System occurred at O'Hare and that O'Hare's share of delays was at least twice those experienced by Atlanta or Newark, the next most delayed airports. This Court does not cite these claims by the FAA as established fact but rather includes them in order to provide some background on the ROD process.

Petition for Review of the FAA's July 25, 2005 EIS and the FAA's September 30, 2005 ROD. In that petition, Plaintiffs alleged that the FAA's approval of the ALP violated, *inter alia*, the First and Fifth Amendments and Article III of the Constitution; RFRA.; NEPA; Chapter 471 of Title 49 of the U.S. Code, Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303(c); Section 6(f) of the Interior Land and Water Conservation Fund Act, 16 U.S.C. §4601-8(f)(3); Section 106 of the NHPA, 16 U.S.C. 470(f); and section 176(c) of the Clean Air Act, 42 U.S.C. §7506(c).

Along with the Petition, the Municipal Plaintiffs and the St. John's Plaintiffs also filed an emergency motion for a stay pending appeal and a motion for an administrative stay pending resolution of Petitioner's motion for a stay pending appeal. That day, the latter was granted so that the Court of Appeals would have sufficient opportunity to consider the emergency motion for stay pending appeal. The petitioners argued in the emergency motion for stay pending appeal that they were likely to succeed on the merits of their appeal because the FAA' s action in issuing an ROD that approved of the City's ALP violated RFRA and because the ROD did not address funding issues. The FAA responded. Chicago was permitted to intervene in the suit.

In light of the FAA's approval of the City's ALP and the ensuing litigation in the D.C. Circuit, this Court issued an order to show cause as to why all but four of the counts in the First Amended Complaint should be dismissed. The four counts not subject to the show cause order were: Count IV, a §1983 claim against the

City for imposing a substantial burden on the St. John's Plaintiffs in violation of the Free Exercise clause; Count VIII, a §1983 claim against Chicago for violating the St. John's Plaintiffs' rights under RLUIPA; Count XII, §1983 claim against the City for targeting the St. John's Plaintiffs in violation of the Free Exercise clause; and Count XVIII, a §1983 claim against the City for discriminating against St. John's Plaintiffs in violation of the Equal Protection clause. In the memorandum accompanying the order, this Court raised concerns about exercising any jurisdiction over the FAA in light of 49 U.S. §46110, and the fact that all parties appeared to be litigating identical issues in both the D.C. Circuit and in the Northern District of Illinois. All parties filed responses. Plaintiffs' responses repeatedly made reference to a second amended complaint they planned to seek leave to file.

On October 7, 2005, the FAA advised the United States Court of Appeals for the D.C. Circuit that it intended to award Chicago the requested $363 million in AIP discretionary funds for phase one of O'Hare development ("Phase One") in early November 2005, but had not yet made a substantive decision granting Chicago's request. The FAA argued that without a final decision on funding, the Court of Appeals did not have subject matter jurisdiction over claims concerning NEPA and RFRA compliance. To the best of this Court's knowledge, the FAA has not yet issued a funding decision.

On October 25, 2005, the D.C. Circuit denied the emergency motion for a stay pending appeal. In its

one-page denial, the appellate court stated that Plaintiffs had not "demonstrated the irreparable injury or likelihood of success on the merits required for the issuance of a stay pending review." *Village of Bensenville et al. v. FAA*, No. 5-1383, 2005 U.S.App.Lexis, 23277 (D.C. Cir. October 25, 2005.) In its denial, the D.C. Circuit did not expressly answer the question as to whether it had jurisdiction over the funding issues prior to a final FAA decision on funding.

The next day, the Municipal and St. John's Plaintiffs returned to this Court, where they filed a motion for leave to file a second amended complaint, a motion for a temporary restraining order, and a motion for a preliminary injunction.[5]

In their proposed Second Amended Complaint, Plaintiffs allege violations of RFRA (Count VII); NEPA; Section 4(f) of the Department of Transportation Act; Section 106 of the NHPA; Section 509 of the AAIA (Count VIII); Article III of the United States Constitution and the Due Process Clause of the United States Constitution (Count X). They take issue with

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[5] The proposed Second Amended Complaint does not include either the Rest Haven Plaintiffs or Mayor Daley as parties to the litigation. For the sake of simplicity, when referring to the proposed Second Amended Complaint, this Court will use the term "Plaintiffs" to refer to St. John's Plaintiffs and the Municipal Plaintiffs, This Court will use the same approach with respect to the term "Defendants" which originally included a reference to Mayor Daley, the State of Illinois, and Governor Blagojevich but does not do so with respect to the proposed Second Amended Complaint.

the process the FAA has used for disseminating information with respect to the O'Hare expansion and so allege a violation of the Freedom of Information Act (Count XI). In addition, the St. John's Plaintiffs allege FAA violations of their rights under the Free Exercise Clause of the First Amendment of the United States Constitution (Count II), the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (Count IV), and the RLUIPA (Count VI). The St. John's Plaintiffs also allege that they have a right to have contested issues of facts relating to their RFRA claim tried in an Article III court (Count IX).

After filing their motion to submit a second amended complaint in this court, the Plaintiffs returned to the D.C. Circuit where they filed a docketing statement of issues on October 31, 2005. In that non-binding statement, they submitted 14 different issues. Included were issues of whether the FAA was in violation of RFRA; NEPA; Section 4(f) of the Department of Transportation Act; Section 106 of the National Historic Preservation Act; the Due Process Clause; the Free Exercise Clause; Chapter 471 of Title 49 of the United States Code; Section 6(f) of the Department of the Interior Land and Water Conservation Fund Act, 16 U.S.C. §4601-8(f)(3); and Section 176(c) of the Clean Air Act, 42 U.S.C. §7506(c). They also submitted that the issues of whether the FAA improperly failed to rule on Chicago's funding applications, violated the Administrative Procedure Act by failing to provide Petitioners with a formal adjudicatory hearing to resolve their claims under RFRA and the First Amendment, and issued an

unlawful ROD were properly before the D.C. Circuit. In addition, Plaintiffs raised the question of whether their First Amendment and RFRA claims require *de novo* review of contested issues of fact and law by an Article III court.

Back in this Court, on November 3, 2005, the parties appeared for a motion hearing on Plaintiffs' motion to file a second Amended Complaint; Plaintiffs' motion for a temporary restraining order; and Plaintiffs' motion for a preliminary injunction. At that hearing, this Court granted the motion for a TRO until November 14, 2005 in order to review the proceeding in the D.C. Circuit. On November 14, 2005, this Court extended the TRO until November 16, 2005, and also continued the motion for leave to file a second Amended Complaint and the motion for a preliminary injunction. Also pending are motions to dismiss the amended complaint, filed by the City and Mayor Daley and the FAA and Administrator Blakey.

Standard of Review

Federal Rule of Civil Procedure 12(b)(1) requires a court to dismiss an action when it lacks subject matter jurisdiction. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir.2003). When reviewing a motion to dismiss brought under Rule 12(b)(1), this court "must accept as true all well-pleaded factual allegations, and draw reasonable inferences in favor of the plaintiff." *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir.1995) (citing *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227, 229 (7th Cir.1993)). The burden of proof, however, is

"on a 12(b)(1) issue is on the party asserting jurisdiction." *United Phosphorus, Ltd.*, 322 F.3d at 946. When determining subject matter jurisdiction, this court "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Ezekiel,* 66 F.3d at 897 (*quoting Capitol Leasing Co. v. Federal Deposit Insurance Corp.*, 999 F.2d 188, 191 (7th Cir.1993)).

The purpose of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir.1990) (citation omitted). On a 12(b)(6) motion, the Court accepts all well-pleaded allegations in the plaintiff's complaint as true and views the allegations in the light most favorable to the plaintiff. *Bontkowski v. First National Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.1993). The Court should not dismiss a complaint "unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Federal Rule of Civil Procedure 15(a) provides that, in most instances, a party must seek leave of court to amend his complaint and instructs the courts to grant leave 'when justice so requires.' Fed. R. Civ. Proc. 15(a). "The terms of the rule, however, do not mandate that leave be granted in every case. In particular, a district court may deny a plaintiff leave to amend his complaint if 'there is undue

delay, bad faith [,] or dilatory motive . . . [or] undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.'" *Park v. City of Chicago*, 297 F.3d 606, 612 (7th Cir. 2002) (*citing Ferguson v. Roberts*, 11 F.3d 696, 706 (7th Cir.1993)).

Analysis

This Court begins its analysis of the issues in this case by reviewing Plaintiffs' response to its rule to show cause motion. In the memorandum accompanying its rule to show cause, this Court noted that Rest Haven is no longer affected by the O'Hare Expansion Project. Plaintiffs do not contend, in their response to the rule to show cause, that Rest Haven will have to be relocated as a result of O'Hare Expansion. Instead, Plaintiffs' response states that this Court should either issue an enforceable order stating "(a) that Chicago will preserve and leave forever undisturbed the graves of the departed at Rest Haven; and (b) that Chicago will guarantee the Rest Haven plaintiffs continued access to the Rest Haven Cemetery" or proceed to judgment on the Amended Complaint.

There is no reason why it the Rest Haven Plaintiffs should not be dismissed from this litigation. The Rest Haven Plaintiffs were given full and fair opportunity to present arguments as to why they are in any way affected by proposed actions by the City and the FAA and failed to do so. Given the lack of a present dispute, this Court concludes that the Rest Haven Plaintiffs are not presently threatened with harm. Plaintiffs were

given ample opportunity to show that there is harm such that Article III standing requirements are satisfied, and failed to do so. Consequently, all counts of the First Amended Complaint brought by the Rest Haven Plaintiffs are dismissed with prejudice. The dismissal of Rest Haven Plaintiffs results in a dismissal of counts V, IX, XIII, XV, and XVII of the Amended Complaint in their entirety and a dismissal of counts I-III, XVIII, XX, and XXI of the Amended Complaint as they pertain to the Rest Haven Plaintiffs.

In the memorandum accompanying the rule to show cause this Court also requested that Plaintiffs show cause as to why Mayor Daley should not be dismissed from this litigation given that bringing suit against a municipal officer in his official capacity and suit against the municipality is duplicative. Rather than addressing the issue raised by the Court, Plaintiffs argue that they should be permitted to file suit at some point in the future against Mayor Daley in his personal capacity. The question of whether Mayor Daley can be sued in his personal capacity at a later point in time is irrelevant to a showing that he should not be dismissed from this suit where he is sued in his official capacity. The claims against Mayor Daley are duplicative of the claims against Chicago and so all claims against him are dismissed. *See Tabor v. City of Chicago*, 10 F.Supp.2d 988, 991 (N.D.Ill., 1998).

This Court also requested Plaintiffs show cause as to why counts intended to halt action before FAA approval were not moot in light of FAA approval and why this Court should exercise jurisdiction over claims brought against the FAA. Plaintiffs responded by

arguing that any problems related to the first Amended Complaint were resolved in the second amended complaint that they were proposing to file. Their response to the rule to show cause consistently refers to the proposed Second Amended Complaint, even with respect to the First Amendment, Fourteenth Amendment, and RLUIPA claims that were not the subject of the show cause order. Moreover, Plaintiffs specifically state in their response that "[i]n light of the motion to file the Second Amended Complaint, plaintiffs respectfully submit that the Court not dismiss the FAA from this case, but rather allow the filing of the Second Amended Complaint." Their decision to forego addressing this Court's concerns with respect to the first Amended Complaint, coupled with their request for permission to file a second amended complaint, indicate that Plaintiffs intend that this Court revisit the issues raised in the show cause order in light of their proposed Second Amended Complaint.

Because the Plaintiffs placed so much store on the proposed Second Amended Complaint in responding to the rule to show cause and because the Defendants argue that the proposed Second Amended Complaint is defective and leave to file it should be denied, this Court will address it first. Of course, if leave is granted, the Second Amended Complaint will supersede the Amended Complaint and any objections to the latter will be moot. As the law requires, for present purposes, the facts alleged in the proposed Second Amended Complaint will be taken as true.

Claims against Chicago

When reviewing the St. John's Plaintiffs' Free Exercise, Equal Protection, and RLUIPA claims, it is helpful to bear in mind what one court refers to as the "tug of war" between Supreme Court and Congress with respect to the review of governmental actions affecting religious actors. In 1990, the Supreme Court held in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) that the Free Exercise Clause does not grant religious actors a reprieve from compliance with neutral laws of general applicability. The Court refused to apply the balancing test employed in *Sherbert v. Verner*, 374 U.S. 398 (1963) which held that government actions that impose a substantial burden on religious practice must be justified by a compelling governmental interest. *See Smith*, 494 U.S. at 883-8. The Court concluded that *Sherbert* applied to the narrow issue of denial of unemployment and did not apply to neutral laws of general applicability. *See Smith* at 879.

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb et seq. The stated purpose of RFRA was to replace the neutrality test with the 'compelling interest test' as set forth in *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205(1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened. 42 U.S.C. §2000bb(b)(1) & (a)(2). The Supreme Court then held that RFRA was unconstitutional as applied to the states. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). In response, Congress passed the Religious Land Use and

Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc et seq.. The language of RLUIPA, like that of the federal RFRA, opts to forgo the neutrality approach. But unlike RFRA, RLUIPA applies only to burdens that are imposed by land use regulations or are imposed by regulations relating to institutionalized persons.

This evolution is significant because with unless strict scrutiny is applied to their claims, the "less burdensome" analysis advocated by St. John's Plaintiffs does not apply to review of the actions of the City and the FAA.

St. John's Plaintiffs devote a significant amount of their complaints discussing how Chicago's actions do not survive strict scrutiny review because of violations of the Free Exercise Clause. What Plaintiffs fail to note, however, is current Supreme Court jurisprudence on the Free Exercise Clause does not require a court to apply strict scrutiny simply because a religious actor is involved. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *see also, Employment Div. Dept. Res. Of Oregon v. Smith*, 494 U.S. 872, 878 (1990). "A law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* The Seventh Circuit has explained, "no Free Exercise Clause violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest."

C.L.U.B. v. City of Chicago, 342 F.3d 752, 763 (7th Cir. 2003).

This Court begins with a review of Plaintiffs' claims in the proposed Second Amended Complaint. According to the proposed Second Amended Complaint, the St. John's Plaintiffs believe that they are entitled to relief because the City's actions in the passage of §30, the amendment to the Illinois RFRA, violate the Free Exercise Clause. As noted earlier, §30 states that "[n]othing in this Act [the Illinois RFRA] limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or graves located therein." 775 ILCS 35/30.

This Court fails to see why it should apply strict scrutiny when reviewing the City's actions with respect to the passage of §30. The Supreme Court noted in *Smith* that strict scrutiny applies only to laws that discriminate against religion. *Smith*, 494 U.S. at 885. There is no indication in the complaint that the object of the law "is to infringe upon or restrict practices *because* of their religious motivation." *See C.L.U.B.* at 763 (emphasis added); *see also City of Hialeah*, 508 U.S. at 532 (government action violates neutrality requirement if it "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). Even assuming that Chicago is responsible the addition of §30 to the Illinois RFRA, the amendment does not single out St. Johannes or any other cemetery because of its religious affiliation. Furthermore, there is no indication that the government, in pursuit of the

legitimate interest of O'Hare expansion has selectively imposed burdens "only on conduct motivated by religious belief." *See Hialeah*, 508 U.S. at 532. The language of the amendment applies to any and all cemeteries that are in the path of O'Hare expansion, regardless of religious affiliation or lack thereof.

Moreover, none of the allegations in the complaint give rise to the inference that the facially neutral language masks more insidious underpinnings. In *City of Hialeah*, for example, Hialeah argued that the facially neutral ordinances outlawing slaughter of animals advanced the public's legitimate interest in protecting public health and preventing cruelty to animals. The Supreme Court determined that Hialeah's ordinances constituted a religious gerrymander intended to affect Santeria adherents but almost no others, in violation of the Free Exercise Clause. *Id.* at 536. Plaintiffs do not allege that Chicago wanted the legislature to pass §30 so that it could satisfy a goal of impeding the St. John's Plaintiffs religious practice by building runways over St. Johannes Cemetery. Nothing in the complaint supports the proposition that Chicago wants the St. Johannes land for any reason other than the reason that it wants all the other land within project boundaries: for the expansion of O'Hare Airport. The language brings the treatment of cemeteries in line with the treatment of all other land in the path of expansion.

Because is no indication that §30 discriminates against religion, this Court applies rational basis review to the City's actions. The actions of Chicago are

rationally related to the legitimate government objective of expanding and improving O'Hare. To be sure, the passage of §30 was an inartful way to anticipate (and head-off) attempts to use the Illinois RFRA to block O'Hare expansion. Nevertheless, it is clear that the provision was not enacted to single out cemeteries for invidious treatment, but rather to preclude the argument that any cemetery would be entitled to more favorable treatment than other properties in the path of O'Hare expansion.

In one of their briefs, Plaintiffs argue that the passage of the "Chicago sponsored" §30 and the "separate acts of "individualized assessment" towards St. Johannes either individually or collectively "trigger First Amendment Free Exercise protection." Plaintiffs appear to confuse the issue of individualized exemptions—an indication that the law is not neutral and generally applicable—with the concept of individualized assessments under RLUIPA. Regardless, they do not merit relief. As noted earlier, the law in question is neutral and generally applicable. No facts in the complaint give rise to an inference that "individualized exemptions from a general requirement are available." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993). In *Church of Lukumi Babalu Aye*, for example, the legislation prohibited all religious slaughter of animals while providing exemptions for most non-religious slaughter of animals. In this case, by comparison, the proposed Second Amended Complaint does not give rise to the inference that there exists any procedure by which any individuals within the proposed acquisition area can

obtain exemptions from condemnation nor is there any indication that any individuals are exempt. *See C.L.U.B.*, 342 F.3d at 764 (rejecting "individualized exemption claim" when "no person, nor any nonconforming land use, is exempt" from ordinance in question.).

The concept of "individualized assessments" appears in the RLUIPA context. See 42 U.S.C. § 2000cc(a)(2)(C) ("the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."). This Court need not get to the issue of whether Chicago will make individualized assessments in violation of RLUIPA, however, because RLUIPA does not apply.

Turning then, to RLUIPA, this Court concludes that it does not apply to the actions alleged in this case. The St. John's Plaintiffs claim, in Count V, that Chicago will violate RLUIPA if it acquires St. Johannes Cemetery without first demonstrating that it needs to acquire the land to accomplish a compelling governmental interest and that there is no alternative to accomplish the compelling governmental need which would not impose the burden on religious activity. The problem with this claim is that RLUIPA only applies to government actions that "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. §2000cc. The term "land use regulation" is defined as

"a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land . . . ." 42 U.S.C. §2000cc-5(5). In this case the City is seeking to exercise eminent domain power. Nothing in the proposed Second Amended complaint leads to the inference that the City's authority to acquire the land stems from any zoning regulations or landmarking law (which is unsurprising given that the City makes no assessment of the land it seeks to condemn.)

The St. John's Plaintiffs argue that the City's actions—even without any allegations that they are taken pursuant to a zoning regulation or landmarking law—are subject to the heightened review of RLUIPA. In support, they cite they cite *Cottonwood Christian Center v. Cypress Development Agency*, 218 F.Supp.2d 1203 (C.D.Cal. 2002).[6] Plaintiffs contend that *Cottonwood* stands for the proposition that all exercises of eminent domain authority are subject to RLUIPA. This Court is not willing to take such an expansive view, nor does it believe that *Cottonwood* stands for such a sweeping proposition. While this Court may not

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[6] Plaintiffs also cite *Faith Temple Church v. Town of Brighton*, 2005 WL 66210 (W.D.N.Y. Jan. 12 2005). In *Faith Temple*, the District Court determined that it could not decide whether to grant the plaintiff's request for a preliminary injunction until it held a hearing on whether the Town's condemnation would violate RLUIPA. The court, rather than undertaking an analysis of whether RLUIPA applied, proceeded under the assumption that it did and ordered a hearing as to the merits of the plaintiffs' injunction request. The conclusory determination of a district court in another circuit is not binding authority nor, in this particular case, is it persuasive.

agree with the passing reference to eminent domain in *Cottonwood*, that case can be read to suggest that RLUIPA is applicable to the specific eminent domain actions where the condemnation proceeding is intertwined with other actions by the city involving zoning regulations.[7]

In one of the many briefs filed in this case, the St. John's Plaintiffs argue that the City's actions can be linked to zoning regulations because the City's proposed actions "imposes severe restrictions on St. John's use or development of St. Johannes." These restrictions, according to St. John's Plaintiffs, are attempts to regulate the land and so are an act of zoning. To call the acquisition of St. Johannes a restriction on St. John's use of the land, however, is more than mere understatement; it is, in fact, an incorrect classification of the actions at issue in this case. Chicago is not seeking to restrict the uses of St. John's—it is planning on acquiring the land pursuant to its eminent domain authority and then using it for the public purpose of expanding the airport. Land use regulations limit the use of property. Condemnation is, in one sense, the ultimate limitation

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[7] Defendants make much of the fact that in *Cottonwood* there was indication in the record that the municipality's exercise of eminent domain was taken pursuant to a resolution that itself was based on a zoning regulation. The district court stated, "[t]he Redevelopment Agency's authority to exercise eminent domain to contravene blight, as set forth in the Resolution of Necessity, is based on a zoning system developed by the City (the LART Plan)." *Id.* at 1221, fn. 7. This Court does not find the Cottonwood court's reasoning persuasive as it relates to such an attenuated relationship between eminent domain and zoning.

on the use of property. It does not follow, however, that condemnation is a land use regulation as this term is used in the statute. Congress could have included "takings" within the reach of RLUIPA but did not. This Court is no persuaded that it should construe the concept of zoning so broadly that any acquisition of land by the City pursuant to eminent domain proceedings is an act of zoning.

This Court is certainly cognizant of the RLUIPA admonition that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C.A. § 2000cc-3. It is important to note that this Court's holding that the City does not act pursuant to a zoning or landmarking law should not be taken to mean that all condemnation proceedings necessarily are outside the scope of RLUIPA. This Court expresses no opinion with respect to that conclusion.[8] The St. John's Plaintiffs' contention that all condemnation proceedings are land use regulations dealing with zoning, however, is not an attempt to construe the statute broadly but rather is an attempt to rewrite it. Again, as with their Free Exercise claim, St. John's Plaintiffs contend that they deserve more protection than the law provides. They fail to state a claim under RLUIPA.

The St. John's Plaintiffs also allege a violation of the

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[8] For example, an act to acquire land (through eminent domain) and then to rezone it and transfer it might very well fall with the reach of RLUIPA.

Equal Protection Clause of the Fourteenth Amendment of the United States Constitution on the basis of the City's violation of their fundamental right to the free exercise of religion. Similar to their arguments with Count I, St. John's Plaintiffs state that "Count III is based on the action of the Illinois Legislature in exempting—again at Defendant Chicago [sic] request—these two religious cemeteries from the protection of Illinois RFRA while preserving Illinois RFRA protection for every other religious institution (including all other religious cemeteries) in the State." As noted earlier, however, the text of the amendment to the Illinois RFRA and the facts alleged in the complaint do not suggest that Illinois RFRA protection has been stripped for only St. Johannes Cemetery: instead, the amendment states that any and all cemeteries (as well as other property) in the path of the O'Hare expansion are subject to acquisition pursuant to the O'Hare Modernization Act. "Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts." *Wirzburger v. Galvin*, 412 F.3d 271, 282-283 (1st Cir. 2005) (citations omitted). Given that Chicago's actions seeking to acquire land adjacent to O'Hare are rationally related to a legitimate government interest in expanding airport capacity, this Court finds no Equal Protection violation on this basis.

Plaintiffs' First Amended Complaint, currently pending before this Court, also fails to state a claim with respect to the St. John's Plaintiff's Free Exercise,

Equal Protection, and RLUIPA claims. Again, Plaintiffs fail to allege facts supporting an inference that Chicago's actions were anything but neutral and generally applicable. They also fail to suggest that a land use regulation caused them harm such that they have a claim under RLUIPA. And finally, they fail to allege facts supporting a conclusion that Chicago's conduct was not rationally related to a legitimate governmental interest as is required when raising an equal protection violation that is based on a failed Free Exercise Claim. *See Wirzburger*, 412 F.3d at 282-283 (citations omitted). Because of Plaintiffs' failure to state a claim with respect to these claims, Counts IV, VIII, XII, and XVIII of the Amended Complaint are all DISMISSED.

Claims Against the FAA and Blakey

The bulk of Plaintiffs' claims in the proposed Second Amended Complaint concern the FAA. As a threshold matter, it is necessary to determine whether this Court may exercise jurisdiction over those claims. As this Court noted in the memorandum accompanying its rule to show cause issued on October 12, 2005,the text of 49 U.S.C. §46110 limits district court review. According to the plain language of the statute, a person disclosing a substantial interest in an order issued by the Administrator of the FAA "in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of

business." 49 U.S.C. §46110(a).[9] The terms "this part" refer to the Air Commerce and Safety provisions ("Part A") of the Aviation Programs Subtitle of Title 49. See 49 U.S.C. §40101 et seq. The term "Part B" refers to the Airport Development and Noise provisions ("Part B") of that same Subtitle. See 49 U.S.C. §47101 et seq. Part B includes the provision which grants FAA the authority to approve ALPs. 49 U.S.C. § 47107(a)(16). The statute provides that the reviewing Court of Appeals "has *exclusive jurisdiction* to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings." 49 U.S.C. §46110(a)(emphasis added).

Plaintiffs seeking appellate court review need not only bring claims that refer to the specific statutory provision granting exclusive appellate jurisdiction; the fact that a plaintiff alleges violations of substantive laws that could otherwise be brought in district court does not defeat appellate court jurisdiction. For example, in *Gaunce v. De Vincentis*, 708 F.2d 1290 (7th Cir. 1983), the Seventh Circuit determined that the Court of Appeals retained exclusive jurisdiction over a challenge that was brought pursuant to both the

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[9] This procedure is also outlined in the FAA's ROD. In the "Right of Appeal" section of the ROD, the FAA states that "[t]his ROD presents the Federal Aviation Administration's final decision and approvals for the actions identified, including those taken under the provisions of 49 U.S.C. Subtitle VII, Parts A and B. This decision constitutes a final order of the Administrator subject to review by the Courts of Appeals of the United States in accordance with the provisions of 49 U.S.C. Section 46110."

Federal Aviation Act—which provided for review in the court of appeals—and the United States Constitution. *See Dole*, 787 F.2d at 192. Instead, "[m]ore broadly, statutes such as Section 46110(c) that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inescapably intertwined' with review of such orders. *Merritt I*, 187 F.3d at 271. A claim is inescapably intertwined in this manner if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 339, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958)." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2nd Cir. 2001). While litigants may seek, through careful pleading, to avoid the strict jurisdictional limits imposed by Congress, there is not reason to believe "that the jurisdictional remedy prescribed by Congress hangs on the ingenuity of the complaint." *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 912 (9th Cir. 1989).

As Seventh Circuit concluded in *Dole*, "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals. If a decision of an administrative agency is based, in substantial part, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of appeals." *Dole*, 787 F.2d at 192 -193.

The requirements of 49 U.S.C. §46110 should come as

no surprise to Plaintiffs. After all, the Municipal Plaintiffs and the St. John's Plaintiffs (collectively referred to as ("Petitioners") filed a petition for review pursuant to U.S.C. 49 U.S.C. §46110(a) on September 30, 2005 in the District of Columbia Court of Appeals. In that petition, the Petitioners alleged, *inter alia*, that the FAA's actions violate the First and Fifth Amendments and Article III of the Constitution, RFRA, NEPA, Chapter 471 of Title 49 of the United States Code, Section 4(f) of the Department of Transportation Act, Section 6(f) of the Department of the Interior Land and Water Conservation Fund Act, Section 106 of the NHPA, and Section 176(c) of the Clean Air Act. That same day they filed an emergency motion for a stay pending appeal which was granted and a motion for an administrative stay which was eventually denied.

Plaintiffs elaborated on the issues before the D.C. Circuit in their appellate court docketing statement. In that non-binding statement they submitted 14 different issues to the D.C. Court of Appeals. Several of those issues reappear in the same or slightly altered form in Plaintiff's proposed Second Amended Complaint.

This Court lacks subject matter jurisdiction over some of these claims. For example, Counts VII, IX, and X of Plaintiffs' proposed Second Amended Complaint are all based on allegations of shortcomings with the ROD and the FAA's approval process for the ALP.

In Count VII, the St. John's Plaintiffs allege that the FAA violated RFRA when it approved the City's ALP.

The St. John's Plaintiffs state in the RFRA claim found in the proposed Second Amended Complaint that the matter "is currently before the United States Court of Appeals for the District of Columbia" and that the St. John's Plaintiffs "have filed this RFRA Count in this Court as a matter of protective jurisdiction to ensure that their federal RFRA claim is not deemed waived." They ask Court to "defer ruling on [the] claim that they are entitled to an Article III tribunal on the contested issues of fact relating to RFRA compliance until the United States Court of Appeals has ruled on that issue." Plaintiffs claim they make this request in the hopes that they can return to this Court with their RFRA claim should the D.C. Court of Appeals determine that disputed issues of RFRA compliance should be tried in an Article III district court. This Court does not believe that it is proper for it to retain jurisdiction on the basis of this argument. Nothing in the statute leads this Court to the conclusion that Congress intended for district courts to remain "on call" with respect to disputed factual issues that surface during appellate court review of an agency's approval of an airport layout plan.

Counts IX and X also relate to questions about the ALP approval process. In Count IX, Plaintiffs allege they have a right to have contested issues of fact related to their RFRA claims tried and determined by an Article III Court instead of the FAA pursuant to its ALP approval process and in Count X, Plaintiffs allege that the FAA violated the Due Process Clause and Article III by serving as an adjudicatory tribunal in ALP approval process. Plaintiff's request that Count X

be stayed is denied: there is no reason for this Court to stay a count over which it does not have jurisdiction. Given Plaintiffs failure to provide this Court with any logical basis for concluding that 49 U.S.C. §46110(a) does not preclude it from exercising jurisdiction over these claims, Plaintiff's request to file a proposed Second Amended Complaint is denied with respect to Counts VII, IX, and X.[10]

Some claims Plaintiff propose are inescapably intertwined with the ROD and therefore are subject to review in the D.C. Circuit. After reading the parties' submissions and holding oral argument, it has become clear to this Court that Plaintiffs intend to concurrently litigate the issue of agency funding in

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[10] Their reticence is somewhat puzzling in light of the fact that this Court has repeatedly raised the issue of subject matter jurisdiction—including the specific question of the impact of 49 U.S.C. §46110 on this Court's ability to entertain Plaintiffs' claims—with Plaintiffs. At one point in the voluminous briefing in this case, Plaintiffs suggested that jurisdiction for judicial review of the FAA's actions with respect to Airport Layout Plan approvals is in the district court. In support, Plaintiffs cited to two cases where appellate courts found no jurisdiction to review directly an FAA order approving an airport layout plan based on the language found in an older version of the statute. *See Committee to Stop Airport Expansion v. FAA*, 320 F.3d 285, 288 (2nd Cir. 2003) and *City of Alameda v. FAA*, 285 F.3d 1143, 1145 (9th Cir. 2002). As the FAA correctly notes, the version of the statute cited in those cases has been superceded by a more inclusive version. On December 12, 2003, Congress modified the statute by providing that the Courts of Appeals have exclusive jurisdiction over orders that are issued "in whole or *in part* under this part [part A], *part B*, or subsection (l) or (s) of section 114". 49 U.S.C. §46110(a) (emphasis added).

both this Court and the D.C. Circuit. In both forums, Plaintiffs focus on the relationship between funding under the Aviation Act and violations of federal laws such as NEPA. In the D.C. Circuit, they take issue with the agency for issuing a ROD that approved of the ALP but did not make any funding determinations. They argue that [t]hat short-sighted and disjointed decision-making process is barred by the NEPA regulations" as well as the AAIA. In this Court, they argue that by allowing Chicago to proceed with acquisition before it makes its funding decision, the FAA is violating NEPA and a host of other federal statutes and regulations including the AAIA. In both courts they argued that acquisition without funding raised particular dangers for plaintiffs who stand to lose lands hastily acquired by Chicago without FAA guarantee of funding.

The arguments Plaintiffs raise in this Court with respect to the FAA's actions allowing Chicago to acquire land before the issuance of a funding decisions by their nature require attention to the issues currently before the D.C. Circuit where Plaintiffs raise arguments dealing with the FAA's failure to issue a funding decision with its ROD that approved Chicago's proposed ALP. Plaintiffs' challenge of agency procedures and reasoning—a challenge raised in this court—is "inescapably intertwined with a review of the procedures and merits surrounding the FAA's order." *See Merritt v. Shuttle Inc.*, 187 F.3d 263, 271 (2nd Cir. 1999). The review of procedures and merits is already underway in the D.C. Circuit.

The D.C. Circuit has issued one ruling in response to

a motion that raised the issue of funding and may find reason to issue other rulings on that topic. Deference to the D.C. Circuit requires that those issues not be decided in a piecemeal fashion by different courts. Rather than contributing to the confusion, and bearing in mind the statement in Dole that "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals," this Court will deny Plaintiffs' leave to file claims related to FAA funding in this Court. See Dole, 787 F.2d at 192-193.

The St. John's Plaintiffs also raise a series of claims related to the FAA's *future* funding decisions with respect to the O'Hare Modernization Project. See Counts II (future funding will violate Free Exercise Clause), IV (future funding will violate the Equal Protection Clause), and VII in part (future funding will violate RFRA). With respect to all of these counts, Plaintiffs allege that the FAA and Blakey have "declared their intent" to provide Chicago with funding but do not allege that a final decision on the funding issue has been made. On November 11, 2003, Plaintiffs filed a motion to apprise this Court of the FAA's statement in the D.C. Circuit that it had not yet issued a final funding decision.

The decision to frame these claims in terms of future funding decisions appears to be an attempt to avoid the exclusive jurisdiction requirements of 49 U.S.C. §46110. After all, if the claims raised in this Court concerned the FAA's completed decisions on funding, this Court would not have jurisdiction to hear them.

See 49 USC §46110. Regardless, opting to frame the claims as not-yet-issued future decisions that will cause harm does not help Plaintiffs obtain district court review.[11] A mere allegation that the FAA intends to act a certain way in the future is not sufficient to gain relief in this Court.

Plaintiffs contend that if this Court does not entertain claims related to future funding issues, they will have no forum in which to present them. Plaintiffs are reminded that Article III does not guarantee litigants a forum where all perceived wrongs may be addressed at all times. In this case, there are legitimate reasons for refusing to issue relief for a decision that the agency has not yet made. Congress empowered the FAA to make funding decisions and limited review of those decisions to the courts of appeals. This Court will not upset that scheme simply because Plaintiffs are concerned that at some point in the future the FAA and Blakey will approve of funding to be used for O'Hare expansion. This Court will not issue orders predicated on guesses as to what the FAA will decide with respect to funding. The agency has not yet made a decision and so there is no guarantee what

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[11] In these claims, Plaintiffs also include conclusory legal statements regarding how FAA officials and personnel assisted Chicago in the various alleged violations "by making material misstatements of fact or engaging in material omissions of fact as to factual issues relating to the elements of compelling need and the availability of alternatives" under the First Amendment Clause (Counts II and VI), and the "strict scrutiny Equal Protection analysis" (Count IV). Be that as it may, these claims are best reviewed in the D.C. Circuit, as they are inescapably intertwined with the FAA's issuance of the ROD.

that decision will be.

Plaintiffs counter that they should be able to file suit here because under *Old Town Neighborhood Ass'n v. Kauffman*, 333 F.3d 732 (7th Cir,. 2003), a district court has jurisdiction to review claims that stem from a defendant's provision of assistance to a local government that then uses the funding to perpetrate violations of federal constitutional and statutory rights. In *Old Town*, however, there was no indication that the courts of appeals had exclusive jurisdiction with respect to orders issued by the federal agency. The district court had no qualms about proceeding with judgment, nor did the Seventh Circuit contend that the district court should have refrained from acting because of a lack of subject matter jurisdiction. Nor was there any indication in *Old Town* that the plaintiffs had filed suit in both district and appellate court with the uniform goal of stopping the acquisition of land.[12]

Count VI of Plaintiffs' proposed Second Amended Complaint alleges that the FAA will violate RLUIPA by providing funding for Phase One of the OMP. Like Counts II, IV, and part of VII, it is not ripe. Moreover, as with other claims, 49 U.S.C. §46110 indicates that the proper forum for the presentation of this claim when it is ripe is the D.C. Circuit.

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[12] What's more, in *Old Town* the Plaintiffs had shown that there was a substantial likelihood that Defendants were going to violate federal law. Plaintiffs have failed to do so in this case. They allege that Defendants will violate the law by funding Chicago's violations.

As for the claims alleged against the FAA in Plaintiff's Amended Complaint, none of them survive this Court's rule to show cause. The counts were all filed in response to the threat that Chicago would seek to acquire the land before the FAA had completed its various analyses of the St. John's Plaintiffs religious claims and before the FAA had issued an ROD approving the ALP. Consequently, they are all now moot. The St. John's Plaintiffs have filed revised versions of some of these claims in the D.C. Circuit. The last claim of the Amended Complaint has been superseded by the sole claim that now constitutes the Second Amended Complaint.

That sole viable claim is Plaintiffs' FOIA claim. In Count XI of the proposes Second Amended Complaint, Plaintiffs argue that the FAA has hidden several thousand documents, including many documents that "are relevant to [St. John's] Plaintiffs' claims under the First Amendment, RLUIPA, and RFRA, and all the Plaintiffs' claims under NEPA, related statutes and the AAIA." The FAA Defendants argue that Plaintiffs' FOIA claim is simply an attempt to indirectly attack the administrative record that is currently before the D.C. Circuit. While FOIA is not a discovery tool and the statute was not intended to facilitate civil discovery, this Court cannot conclude that Plaintiffs have failed to allege a valid FOIA claim. Furthermore, it appears that Plaintiffs may not file their FOIA claim in the D.C. Circuit because the FOIA statute grants jurisdiction for filing claims in the district courts. 5 U.S.C. §552(g)(1). Plaintiffs are therefore granted leave to file their proposed Second Amended Complaint

as it relates to Count XI and Count XI only.

Conclusion

Plaintiffs' motion to file a proposed second Amended Complaint is DENIED with respect to Counts I through X but GRANTED with respect to Count XI. Given that no unique counts remain in the first Amended Complaint that overcome the problems raised by this Court in its show cause order and in this opinion, Plaintiffs' first Amended Complaint is DISMISSED. The TRO is VACATED. Based on the actions in this opinion, Plaintiff's motion for a preliminary injunction is DENIED as MOOT.

At the conclusion of this case, this Court is reminded of the Seventh Circuit's ending to an airport expansion case. The Court of Appeals remarked, "Petitioners conceive of themselves as the innocent, passive victims of a relentlessly expansive O'Hare. They point out that many of the communities surrounding O'Hare were established long before the airport had been built. In all fairness, however, these same communities receive enormous economic benefits from their proximity to O'Hare. Moreover, many of these communities have resisted attempts by the City to harmonize their own land-use regulations with the aviation activity at O'Hare. In a perfect world, petitioners would be able to reap the benefits of their location and still be able to sleep without noise disturbances at night. Unfortunately, the FAA and the City are forced to operate in a world where even their most carefully considered decisions are likely to adversely affect some people." *Dole*, 787 F.2d at 200 (7th Cir.1986). Simply

because there is adverse effect, however, does not mean that expansion must be halted.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 4, 2007

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 05-4418
Consolidated with Nos. 05-4450 and 05-4451

ST. JOHN'S UNITED CHURCH OF CHRIST, an Illinois not-for-profit corporation, HELEN RUNGE, and SHIRLEY STEELE,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, an

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 3726

David H. Coar, *Judge.*

Illinois municipal corporation, FEDERAL AVIATION ADMINISTRATION, and MARION C. BLAKEY, Administrator of the Federal Aviation Administration,

Defendants-Appellees.

ORDER

Plaintiffs-Appellants filed a petition for rehearing and rehearing *en banc* on October 26, 2007. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and petition for rehearing *en banc* are DENIED.

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[1] Judge Ilana Diamond Rovner took no part in the consideration of this matter.

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(3)

No. 07-1127

FILED
APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
Petitioners,

v.

CITY OF CHICAGO, FEDERAL AVIATION ADMINISTRATION, and ROBERT A. STURGELL, Acting Administrator of the Federal Aviation Administration,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit erred in declining to apply strict scrutiny to Chicago's actions in urging enactment of state legislation to expedite acquisition of real property—including petitioners' cemetery—needed for airport modernization when the legislation, on its face and in operation, treated petitioners no differently from similarly situated non-religious property owners or similarly situated religious entities.

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IN THE

Supreme Court of the United States

No. 07-1127

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
Petitioners,

v.

CITY OF CHICAGO, FEDERAL AVIATION ADMINISTRATION, and ROBERT A. STURGELL, Acting Administrator of the Federal Aviation Administration,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

STATEMENT

This case arises from the City of Chicago's plan to modernize O'Hare International Airport to address longstanding design limitations that cause staggering delays and burden both national air traffic and local and state economies. The O'Hare Modernization Program (OMP) reflects years of work by local, state and federal agencies, and millions of dollars of studies, and requires acquisition of hundreds of privately owned properties, including homes, businesses, and one church-owned cemetery. To facilitate the project, the Illinois General Assembly passed the

O'Hare Modernization Act (OMA), 620 ILCS 65/5, which generally denies effect to all state laws that might otherwise apply to land acquisition and construction in the project area and expressly amends numerous identified statutes, including the Illinois Religious Freedom Restoration Act (IRFRA), 775 ILCS 35/1. Petitioners claim that Chicago violated the Free Exercise Clause when it urged enactment of this measure because IRFRA previously provided for heightened judicial scrutiny of government action incidentally burdening religious exercise. According to petitioners, Chicago targeted and singled out "those who worship at religious cemeteries located adjacent to O'Hare." Pet. 3. The Seventh Circuit held strict scrutiny inapplicable because Chicago's actions in advocating enactment of the OMA and eventually implementing the OMP were neutral in both purpose and effect—far from being singled out, petitioners were treated the same as others whose property was needed for the OMP; they were treated differently only from religiously affiliated landowners elsewhere in the state whose property was not needed for the airport project. The court went on to conclude that petitioners' allegations would fail even on strict scrutiny.

This decision was correct and not in conflict with decisions of any other court. This Court's review is not warranted.

Facts and Proceedings Below

1. Tens of millions of passengers pass through O'Hare every year. Pet. App. 38a. It is "not only one of the busiest airports in the world" but "one of the most congested," with delays "at least twice as bad as that of the next two airports that suffer from excessive delays, Atlanta and Newark." *Id.* at 37a.

Moreover, "[d]elays at O'Hare spark further delays around the country and the world, with serious economic and logistical consequences." *Id.* at 37a-38a. The OMP, announced in June 2001, addresses these chronic delays. *Id.* at 5a. It replaces O'Hare's current intersecting runway layout—designed for Eisenhower-era aviation—with six parallel and two crosswind runways, enabling a constant stream of landings and takeoffs. *Id.* at 5a-6a. As modified, O'Hare will resemble the modern design at other major hubs. *Id.* at 5a.

The OMP requires about 440 acres of land adjacent to O'Hare. FAA Record of Decision (ROD) 34.[1] This area includes 539 private homes, 197 businesses, public facilities, parklands, and St. Johannes Cemetery, which lies directly in the path of new runway 10C/28C. ROD 34, 97.[2] Chicago, the FAA, and relevant state agencies have entered into a memorandum of agreement specifying detailed protocols for relocation of the cemetery. ROD 76; ROD App. B.

2. After the OMP was announced, petitioners—St. John's United Church of Christ, which owns St. Johannes, and two individuals with relatives buried at the cemetery—filed suit in state court under IRFRA. Pet. 6. IRFRA subjects government action burdening religious exercise to more stringent scrutiny than imposed under the Free Exercise

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[1] The ROD is at http://www.agl.faa.gov/OMP/ROD.htm.

[2] A diagram from the final Environmental Impact Statement showing the new runways and the cemetery is reprinted at App., *infra*, 1a. Chicago's original plan also proposed acquiring Rest Haven Cemetery, but it was accommodated in a cargo area. Pet. App. 11a, 17a-18a. After extensive analysis, FAA experts concluded that no alternative design would avoid St. Johannes without compromising the project. *Id.* at 39a, 42a.

Clause, see *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), and was enacted after this Court held the federal Religious Freedom Restoration Act (RFRA), which imposed similar heightened standards, unconstitutional as applied to state and local governments, see *City of Boerne v. Flores*, 521 U.S. 507 (1997). Petitioners contended that Chicago's relocation of the cemetery was not the least restrictive means of accomplishing a compelling state interest. This was one of several state-court actions entangling implementation of the OMP. In another, brought by municipalities near O'Hare, the Circuit Court of DuPage County issued a preliminary injunction against acquisition of property without state approval. Pet. App. 6a-7a.

3. In May 2003, the Illinois General Assembly, responding to concerns that litigation under various state statutes would delay the OMP, enacted the OMA, declaring it "essential that the [OMP] be completed efficiently and without unnecessary delay" and that land acquisition "be completed as expeditiously as practicable." OMA § 5(a)(6), (7).[3] The OMA declares the General Assembly's intent "that all agencies of this State and its subdivisions * * * facilitate the efficient and expeditious completion of the [OMP] to the extent not specifically prohibited by law, and that legal impediments to the completion of the project be eliminated." *Id.* § 5(b).

The OMA authorizes Chicago, "notwithstanding any other law to the contrary," to acquire "for purposes related to" the OMP, "any property" rights, including "any property used for cemetery purposes

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[3] The OMA is reprinted at App., *infra*, 2a-23a.

* * * and to require that the cemetery be removed to a different location." OMA § 15. See also Pet. App. 7a-8a. The OMA also effects express, partial repeals of "more than a dozen laws to remove legal obstacles to O'Hare's expansion." Pet. 7. See also Pet. App. 8a ("every statute that someone thought might stand in the way of the OMP"). These include the Archeological and Paleontological Resources Protection Act (OMA § 90); the Human Skeletal Remains Protection Act (§ 91); several provisions of the Illinois Municipal Code (§ 92); the Downstate Forest Preserve District Act (§ 93); the Illinois Aeronautics Act (§ 94); the Code of Civil Procedure (§ 95); and IRFRA (§ 96). IRFRA's new section 30 provides that "[n]othing in this Act limits the authority of the City of Chicago to exercise its powers under the [OMA] for the purposes of relocation of cemeteries or the graves located therein." 775 ILCS 35/30.

4. After the OMA was enacted, petitioners voluntarily dismissed their state-court suit and filed this federal action. Pet. 7. Petitioners claimed that Chicago had prohibited their free exercise of religion by advocating legislation including the IRFRA amendment. Pet. App. 35a, 84a, 86a.[4] The district court rejected petitioners' Free Exercise claim. *Id.* at 83a-87a. It ruled that the OMA is a neutral law of general applicability to facilitate and expedite the

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[4] Petitioners also asserted claims under the Equal Protection Clause and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc et seq. Along with the two municipalities that had obtained the state-court injunction, they asserted a variety of federal claims against the FAA. And Rest Haven Cemetery asserted the same claims as the other plaintiffs. These claims have all been abandoned.

OMP and "does not single out St. Johannes * * * because of its religious affiliation." *Id.* at 84a.

5. While the case was pending in the district court, the FAA completed its environmental review and approved Chicago's airport layout plan (ALP) pursuant to federal aviation statutes. The FAA compiled a "voluminous" administrative record supporting its decision. *Village of Bensenville v. FAA*, 457 F.3d 52, 73 (D.C. Cir. 2006). Among other issues, the FAA examined petitioners' claim that approving a plan requiring relocation of St. Johannes would violate RFRA. ROD 92. Assuming applicability of RFRA for purposes of analysis, the FAA examined thirteen alternative designs that would avoid relocating the cemetery—including five submitted by petitioners—but concluded that none would fulfill the compelling interest in reducing delays and congestion. ROD 95, 98-102. The FAA therefore determined that Chicago's project satisfied RFRA. ROD 102. The FAA also rejected petitioners' Free Exercise claim. ROD 103-04.

Petitioners, among others, sought review in the D.C. Circuit of the ALP approval and, when the FAA issued a letter of intent (LOI) to provide funding for the OMP, of that decision, too. Petitioners abandoned their Free Exercise claim, arguing only for heightened scrutiny under RFRA. The D.C. Circuit ruled that RFRA did not apply and denied both the petition for review, see *Bensenville,* 457 F.3d at 59-68, and a petition for rehearing en banc. The court also ruled that the LOI was not reviewable and vacating it would not redress petitioners' claimed injury. See *id.* at 68-70.[5]

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[5] Petitioners filed three more petitions for review in the D.C. Circuit from FAA decisions regarding OMP funding. *St. John's*

6. The Seventh Circuit affirmed the dismissal of petitioners' Free Exercise claim against Chicago. The court "accept[ed]" petitioners' representations that relocation of the cemetery was a "'sacrilege to [their] religious faith.'" Pet. App. 31a-32a. Nevertheless, under *Smith* and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), the OMA was a neutral law of general applicability not subject to strict scrutiny. The court noted that "to determine whether a law is neutral, as the Court used the term in *Smith*, we must examine the object of the law" to ensure that it does not "'infringe upon or restrict practices because of their religious motivation.'" Pet. App. 29a (quoting *Lukumi*, 508 U.S. at 533). The "related principle of 'general applicability' forbids the government from 'impos[ing] burdens only on conduct motivated by religious belief' in a 'selective manner.'" *Id.* at 29a-30a (quoting *Lukumi*, 508 U.S. at 543). The "text of the OMA" (*id.* at 33a) did not discriminate against or target religious institutions; it provided that "*any* property, religious or otherwise, within the area designated for O'Hare expansion is subject to the extraordinary powers conferred in the OMA" (*id.* at 32a).

The court similarly rejected petitioners' claim that the OMA "singled [them] out" (Pet. App. 40) from those previously protected by IRFRA, noting that "as matters have developed, [St. Johannes] is now the

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United Church of Christ v. FAA, No. 06-1386 (filed November 20, 2006; decided March 21, 2008) (challenging first grant under LOI); *St. John's United Church of Christ v. FAA*, No. 07-1362 (filed September 12, 2007) (challenging approval of passenger facility charges); *St. John's United Church of Christ v. FAA*, No. 07-1435 (filed October 25, 2007) (challenging second grant under LOI).

only cemetery * * * affected" (*id.* at 35-36a), but that "'adverse impact will not always lead to a finding of impermissible targeting'" (*id.* at 36) (quoting *Lukumi*, 508 U.S. at 535). Here, the provision would have applied to any religious cemetery in the project area, and the supposedly different treatment of St. Johannes, in comparison to cemetery properties in other parts of the State, reflects that only St. Johannes "is near O'Hare and * * * the City badly needs the land to construct additional runways." *Id.* at 46a.

The court then examined "available evidence" of the OMA's "object" and concluded that it was not based on any "subtle or masked hostility to religion." Pet. App. 34a. The OMA's "stated purpose" was to eliminate legal impediments to the OMP, and "most" of the statute had "absolutely nothing to do with religion, cemeteries, or IRFRA." *Id.* at 35a. Finally, the court concluded that, even if heightened scrutiny applied, the pressing need to expand O'Hare and the careful consideration of alternatives satisfied that test. See *id.* at 36a-42a.

Judge Ripple dissented. He concluded that the IRFRA amendment triggered strict scrutiny both because "the *only* cemeteries affected * * * are those *religious* cemeteries that the City may seek to relocate" (Pet. App. 60a) and because strict scrutiny applied even to a "facially neutral" law that "imposes a substantial burden on religion" (*id.* at 61a), circumstances he thought were present because "relocation of St. Johannes would force St. John's to forego its religious precepts regarding the burial of its members" (*id.* at 62a).

The Seventh Circuit denied rehearing en banc and a motion to stay the mandate.[6]

REASONS FOR DENYING THE PETITION

One fact controlled the disposition below: Chicago must acquire hundreds of properties to modernize O'Hare. One is a cemetery owned by a church; the rest are private homes and businesses and a few public facilities and parks. Neither the OMA itself nor IRFRA after its amendment treats the church differently from any other property owner in the acquisition area or any other secular owner outside the acquisition area. Likewise, if St. Johannes were located elsewhere in Illinois, petitioners would continue to enjoy full IRFRA protection, while if any other denomination owned a cemetery at the location of St. Johannes, that church would not. As the Seventh Circuit aptly noted, the IRFRA amendment, like Chicago's actions in allegedly procuring it, was based on geography, not religion.[7]

For this reason, the Seventh Circuit's unexceptionable—and entirely correct—decision does not warrant review. The "fundamental question" petitioners claim divides the federal courts—"whether a law that singles out religious activity for differential treatment" (Pet. 2) necessarily triggers strict First

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[6] Chicago has since filed a complaint to condemn St. Johannes and a motion for immediate vesting of title under the "quick-take" provisions of state law.

[7] Petitioners pled their Free Exercise claim solely against Chicago, and they litigated that claim against Chicago alone in the Seventh Circuit. Thus, while the FAA is a respondent in the case (because it was a defendant on other claims), the sole question presented in the petition for certiorari does not concern the FAA.

Amendment scrutiny—is simply not presented here. Nor is there any conflict in the Circuits. Rather, the Seventh Circuit recognized—as does every Circuit—that a law burdening religion triggers strict scrutiny if similarly situated religious claimants are treated differently *or* there is evidence of discriminatory intent.

Petitioners' allegation of conflict with this Court's "Free Exercise jurisprudence" (Pet. 23) adds nothing. Petitioners do not even claim a conflict with any decision other than *Lukumi*—not the Court's landmark decision in *Smith*, nor the post-*Lukumi* decision in *Locke v. Davey*, 540 U.S. 712 (2004), which they discuss in a lone footnote. Even their discussion of the *Lukumi* "jurisprudence" is limited to a concurring opinion, and they find a conflict only by fundamentally misreading both the Seventh Circuit's decision and Justice Scalia's opinion, which addresses a narrow issue having nothing to do with this case. The analysis and result in the court below conflict with no opinion in *Lukumi*—or any decision of this Court, pre- or post-*Lukumi*.

In any event, for many reasons this case represents an extraordinarily poor vehicle for considering any legal issue of general significance. First, this case does not even present the issue on which petitioners seek review. Second, the Seventh Circuit, like the FAA before it, actually undertook the strict scrutiny petitioners seek here and still rejected their claims. Third, petitioners' contention that Chicago's role in obtaining the IRFRA amendment prohibits the free exercise of their religion cannot be likened to any claim ever sustained by any court. Finally, petitioners' challenge to the constitutionality of the OMA in this case, without actually presenting their IRFRA

claim, means that even success in this litigation would be a pyrrhic victory, since the IRFRA rights they seek to reclaim would confront the state-law bar of res judicata.

I. THIS CASE PRESENTS NO CIRCUIT SPLIT.

Petitioners seek review because the Seventh Circuit supposedly held, in conflict with other Circuits, that, without animus or hostility, government action targeting and singling out religion (or one particular religion) is not subject to strict scrutiny. Petitioners claim that in the Third, Sixth, Tenth, and Eleventh Circuits, laws selectively burdening religion (or particular religions) themselves trigger strict scrutiny, without a showing of improper purpose, while other courts have taken the Seventh Circuit's side, requiring proof of hostility even where government action is not neutral toward religion.

Petitioners' claim of conflict misreads the Seventh Circuit's decision. That court did not uphold the targeting of religion. Instead, the court rejected petitioners' claim on its own terms—because petitioners were not singled out. All property owners in the acquisition area were treated alike, and no similarly situated religious claimant retained more rights.

No case petitioners cite applies any different rule. While the Seventh Circuit's application of settled law to the facts of this case would not be certworthy in any event, the result reached below would have been the same in every Circuit.

Nor do the older decisions of the First and Ninth Circuit petitioners cite support their call for review in

this case. First, to the extent those decisions could be read to imply hostility must be shown, even where religion is selectively burdened, the Seventh Circuit rejected that rule. Second, those decisions, addressing Free Exercise challenges to restrictions on funding religious education, did not announce an across-the-broad "hostility" requirement, but grappled with the difficulties particular to that setting, including the government's interest in avoiding establishment of religion. As for the Fifth Circuit, its unpublished decision naturally does not treat the Free Exercise claim in depth but rather generally included it in a broader discussion of free speech and assembly claims leveled at one individual's arrest. Nothing significant can be gleaned from that decision—except that petitioners were bent on magnifying their claim of a circuit split.

A. The Decision Below Does Not Conflict With That Of Any Other Circuit.

The Seventh Circuit did not hold, as petitioners argue repeatedly, that strict scrutiny requires proof of hostility toward religion. See, *e.g.*, Pet. 12, 18, 23, 26. Nor did it "concede[]" that "a law singl[ing] out religion for unequal treatment * * * was not enough." *Id.* at 20. These assertions cannot be squared with the opinion below. The Seventh Circuit explicitly recognized that "'general applicability' forbids the government from 'impos[ing] burdens only on conduct motivated by religious belief.'" Pet. App. 29a-30a (citations omitted). Just as clearly, the court expressly disavowed that under "the inquiry required by *Lukumi* * * * a plaintiff is *required* to allege animus or prejudice * * * to state a free exercise claim." *Id.* at 43a. Instead, it treated evidence of invidious motive as a sufficient, alternative basis for

invalidating (or at least, closely scrutinizing) a neutral law of general applicability (see *id.* at 34a-36a)—a rule especially solicitous of Free Exercise claims. Finally, the court did not reject petitioners' bid for strict scrutiny because they did not allege more than "targeting" or "selective burden," but rather because they failed to allege the kind of selective burdening necessary for a Free Exercise claim—namely, that the OMA treated them differently from other similarly situated property owners. See *id.* at 32a, 36a, 43a-44a.

This precise distinction explains the supposedly conflicting decisions petitioners cite. The Eleventh Circuit, in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (2004), cert. denied, 543 U.S. 1146 (2005), like the Seventh Circuit here, held that proof of hostility or subjective invidious intent is not required (see *id.* at 1234 n.16), but did not hold that every law burdening religious practice is subject to strict scrutiny. Rather, "[z]oning laws * * * restricting religious assemblies to designated districts" (*id.* at 1234) trigger heightened review only when they "treat[] similarly situated secular and religious assemblies differently" (*id.* at 1232). See also *id.* ("unequal treatment indicates the ordinance improperly targets the religious character of an assembly").[8]

The court thus stated the same principle as the Seventh Circuit here. Heightened scrutiny applies if challenged government action dissimilarly treats religious claimants and those who are, in relevant respect, similarly situated. What distinguishes

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[8] Petitioners do not acknowledge that the court in *Midrash* interpreted the "equal terms" provision of RLUIPA, which it assumed was coextensive with constitutional guarantees.

the two cases is not disagreement about the Free Exercise Clause but rather that Surfside, unlike Chicago, did not regulate evenhandedly between religious and secular property owners. Surfside's land-use regulation, based on "retail synergy," was "pursued only against religious assemblies, * * * not other non-commercial assemblies," without any "evidence that private clubs and lodges *actually* contribute to the business district in a way appreciably different than religious institutions." 366 F.3d at 1234. See also *id.* at 1234-35 (citing evidence of underinclusiveness of the restriction). Here, however, there is a glaringly obvious difference between property within and without the acquisition area—only the former is needed to construct the airport. As a result, the differing treatment is not actionable. See *Lukumi*, 508 U.S. at 542-43 ("All laws are selective to some extent, * * * [but] inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.").

Likewise, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), did not hold that application of a police department's no-beard policy would be subject to strict scrutiny simply because it burdened Muslim officers' religious exercise—or because the policy singled out religious beard-wearing while leaving other religious practices unaffected. Rather, the Third Circuit held that the policy warranted heightened scrutiny because Newark's stated motivation—uniformity—applied to beards worn for religious and non-religious reasons, yet Newark treated religious and non-religious claimants differently for purposes of granting excep-

tions. See *id.* at 364-66. This reflected an impermissible "value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome [the] general interest in uniformity but that religious motivations are not." *Id.* at 366.[9] Here, petitioners challenge no similar "value judgment," and no value judgment was made. Petitioners' cemetery was excluded from IRFRA simply because of where it is located, and Chicago's acquisitions embrace all property, secular and religious, needed to expand O'Hare.

Nor is the decision in *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006), inconsistent. *Shrum* was a qualified immunity appeal in which the police chief accepted, for purposes of appeal, that he made assignments "to force Officer Shrum out, [by] making him choose between his duties as a police officer and his duties as a minister." *Id.* at 1144. The court recognized that if the Sunday morning work assignment was the result of a neutral seniority policy, the Free Exercise claim would fail. See *id.* at 1145. The court nevertheless affirmed the denial of summary judgment based on evidence that the Sunday assignment was "motivated by Officer Shrum's religious commitments" and that a shift exchange with another officer had been denied because of those commitments; such action would not be "neutral" toward religion (*id.* at 1144) and would violate the

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[9] By contrast, as then-Judge Alito also explained, the exemption for undercover officers did not trigger heightened scrutiny. Undercover officers were not similarly situated with respect to the government's "interest in uniformity," and "the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." *FOP*, 170 F.3d at 366.

Free Exercise Clause without proof of "animus" (*id.* at 1145). Indeed, the Seventh Circuit correctly noted the discriminatory treatment at issue in *Shrum*, but likewise noted that petitioners were not treated differently from other similarly situated property owners. See Pet. App. 43a-44a.

Petitioners' last claim of conflict, based on *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993), is wrong as well. There, the Sixth Circuit followed a two-step approach similar to the Seventh Circuit's and similarly recognized that "illicit motive is merely a sufficient, not a necessary, condition to trigger strict scrutiny." Pet. 17. Nevertheless, Kissinger's Free Exercise claim failed because she did not identify any veterinary student allowed to graduate without passing the course she found religiously objectionable. See 5 F.3d at 179-80. Here, petitioners' claim failed because they cannot identify any property owner whose land is similarly needed for airport expansion and who is treated any differently under the OMA. Indeed, *Kissinger* precludes petitioners' attempt to compare themselves to owners and believers outside the acquisition area—plainly there were students at Ohio State, but outside the veterinary school, who were not required to pass the course Kissinger did not want to take.

In sum, petitioners' claim of conflict ignores the critical step in the decisions they invoke and commits the very error the Seventh Circuit identified: claiming "differential" (Pet. 2) or "objectively unequal treatment" (*id.* at 4) simply because Chicago's actions affect them and not members of other religions. But the court below sensibly asked whether petitioners were adversely affected as compared to others situated similarly with respect to Chicago's legitimate and neutral purposes. See *Lukumi*, 508 U.S. at

543. Petitioners' claim failed because they were not "targeted" or "singled out," not because the Seventh Circuit applied a different legal standard than other courts of appeals.

B. The Cases Petitioners Align With The Decision Below Do Not Show A Need For Review Here.

Petitioners' discussion of the cases on the other side of the supposed circuit conflict is even more deficient. In fact, since, as we explain above, the Seventh Circuit explicitly noted no showing of motive or animus is required if the plaintiff actually establishes that he was selectively burdened or targeted (see Pet. App. 32a, 36a, 43a), if the Circuits were truly divided on whether strict scrutiny applies to discrimination, the Seventh Circuit would be on petitioners' side of the divide. But the First, Fifth, and Ninth Circuits, which petitioners labor to place in conflict with the decisions just discussed, do not impose a general hostility requirement either. Two cases involved challenges to restricted funding for religious education. As petitioners observe, both *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), cert. denied, 528 U.S. 931 (1999), and *KDM ex rel. WJM v. Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999), cert. denied, 531 U.S. 1010 (2000), rejected the argument that *Lukumi* required strict scrutiny, concluding, *inter alia*, that rational-basis review applied absent evidence that the distinctions were invidiously intended. Petitioners also correctly quote Judge O'Scannlain, dissenting from denial of rehearing *en banc* in *KDM ex rel. WJM v. Reedsport School District*, 210 F.3d 1098 (9th Cir. 2000), lamenting the "'growing confusion among the lower courts over the demands of the First Amendment.'" Pet. 21 (citation

omitted). But petitioners' lengthy discussion of these cases has a Rip Van Winkle quality to it. The notion that this Court now needs to settle a conflict involving the 1999 and 2000 decisions in *Strout* and *KDM* simply ignores that this Court did just that in *Locke*.[10]

Notably, the Court's resolution of the issue in *Locke* was not what the *KDM* dissent expected. While Judge O'Scannlain was confident that any "faithful reader of [*Lukumi*]" would recognize that every law "*non-neutral on its face* * * * triggers strict (and almost always fatal) scrutiny—even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus," 210 F.3d at 1099, Chief Justice Rehnquist, writing for a 7-2 majority, rejected the Free Exercise claim because it "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." 540 U.S. at 720. Noting the States' strong interest in not funding religious ministry, the Court held that refusing to fund preparation for that vocation on equal terms with preparation for other professions was not a denial of Free Exercise, absent evidence that it was motivated by "hostility toward religion." *Id.* at 721. As the Court explained, "training for religious professions and training for secular professions are not fungible" (*id.*), and "nothing in Washington's overall approach * * * indicates it 'single[s] out' anyone 'for special burdens on the basis of * * * religious calling'" (*id.* at 724 n.8) (quoting dissent)).

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[10] Those cases were called to the Court's attention in *Locke*. See Brief for the United States, No. 02-1315, at 17 n.3. And since *Locke*, the First Circuit has held that while *Strout* was no longer controlling as a matter of *stare decisis*, it would reach same conclusion under *Locke*. See *Eulitt v. Maine*, 386 F.3d 344, 350, 356 (2004).

As for *World Wide Street Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336 (2007), although petitioners do not reveal the disposition, the Fifth Circuit reversed summary judgment on the ground that a Free Exercise claimant was entitled to show discriminatory motive.[11]

Also misplaced is petitioners' reliance on Justice Thomas's dissent from the denial of certiorari in *Columbia Union College v. Clarke*, 527 U.S. 1013 (1999), as prelude to their claim that "guidance is needed even more urgently today than it was then." Pet. 22. That case has no relevance here. *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), addressed this Court's Establishment Clause and Free Speech cases; and neither the court of appeals' majority nor the dissent mentioned *Lukumi* even once, while the Free Exercise Clause received only passing mention. See *id.* at 155 n.1 & 172. In any event, like reliance on the other pre-*Locke* cases, this citation fails to take account of the Court's intervening effort to provide guidance. Of all petitioners' citations, only a student note post-dates *Locke*; and it deals exclusively with *Lukumi*'s application to education funding laws, ultimately concluding that "the neutrality principle does not work in the school funding context" and that "[t]he Court in *Locke* was right to focus on 'animus towards

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[11] Only by selecting a few words out of context can petitioners find anything in the Fifth Circuit's unpublished opinion to complain about. Ignoring that the court analyzed the free speech and free exercise claims together, they highlight language that was the court's shorthand for the free exercise analog to content-based discrimination on speech. It is clear that this decision was pressed into service because it is the only one in the country petitioners could find post-*Locke* with any remotely helpful language.

religion.'" Sarah Waszmer, *Taking It Out of Neutral: The Application of* Locke's *Substantial Interest Test to the School Voucher Debate*, 62 Wash. & Lee L. Rev. 1271, 1274, 1309 (2005).

That said, the Seventh Circuit did not rely on the First and Ninth Circuit decisions, or on *Locke* itself; nor did it need to.[12] As we explain above, the court below correctly held that Chicago's actions and the OMA itself were neutral in every relevant respect. The standard of review in cases like *Strout* and *KDM*, involving non-neutral statutes, is simply irrelevant. Nevertheless, the court went on to conclude both that there was no anti-religious animus here and that strict scrutiny would be satisfied if it were required. Indeed, this case would be no different under the *Locke* dissent, which maintained that withholding a "generally available benefit" from "some individuals solely on the basis of religion" violates the Free Exercise Clause. That did not happen here. The "benefits" of IRFRA (Pet. 7)—and other state laws—were withheld solely on the basis of geography (see Pet. App. 35a-36a, 40a) and, moreover, were withheld from all property owners in the acquisition area.

II. THE DECISION BELOW IS ENTIRELY FAITHFUL TO THIS COURT'S PRECEDENTS.

Unsurprisingly, given the Seventh Circuit's complete consistency with the decisions of other courts of appeals, the decision below does not conflict with any precedent of this Court, either. On the contrary, it

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[12] The opinion contains a solitary citation to *Locke* (Pet. App. 34a), for the principle that other provisions of a statute are a more reliable guide to intent than legislative history.

correctly applies the rules laid down in *Lukumi*—the only of this Court's Free Exercise decisions petitioners actually discuss—to the facts of this case.

Petitioners' claim of conflict proceeds from the premise that the Seventh Circuit construed the First Amendment as imposing "a motive requirement," while *Lukumi* established that proof of "an intent to suppress religion was * * * sufficient," but not necessary. Pet. 26. This contention fails because petitioners get the decision below exactly backwards. As we explain above, the Seventh Circuit recognized that "the inquiry required by *Lukumi*" entails determining both whether the challenged statute is "a neutral law of general applicability" and whether a law's "'facial[] neutral[ity] * * * masks more insidious underpinnings.'" Pet. App. 43a (quoting Pet. App. 85a). Nevertheless, the court did not "inclu[de] * * * a motive requirement." Pet. 28. To the contrary, as we also explain, the court explicitly rejected any notion that the district court had "suggest[ed] that a plaintiff is *required* to allege animus or prejudice in order to state a free exercise claim." Pet. App. 43a. And beyond the obvious problems caused by misreading or at least mischaracterizing the decision below, petitioners' attempts to generate a conflict with this Court's cases depend on misreading *Lukumi* as well (not to mention a willful blindness to *Locke* and *Smith*).

According to petitioners, the Seventh Circuit erred by following a section of Justice Kennedy's *Lukumi* opinion that failed to garner a majority, one in which he (joined only by Justice Stevens) supposedly endorsed a "motive requirement" (Pet. 28), rather than recognizing that a majority of the Court held that a law could be invalidated absent hostility to

religion (see *id.* at 27). But the disputed portion of the *Lukumi* opinion did not assert that invidious legislative motive was required—it merely suggested that evidence of bad motive, such as that found in legislative history, could be considered in analyzing the object of a law. See 508 U.S. at 540-42. Petitioners likewise mistake Justice Scalia's concurring opinion, which they say declared the object or purpose of the law irrelevant, in favor of an effects test. See Pet. 25-26. Of course, a complete rejection of any concern for a law's "object" would have been, to the say the least, extraordinary for Justice Scalia, who had authored the Court's then-recent opinion in *Smith*.

Nor can Justice Scalia's opinion be fairly interpreted to reject this inquiry. To the contrary, the whole thrust of the language petitioners extract from his separate opinion addresses the propriety of considering the subjective motivations of individual legislators in ascertaining the "object" of the law they enacted. The opinion took pains to clarify that determining the "object" of the law is the central inquiry in Free Exercise analysis. See 508 U.S. at 558 ("I do not join [Part II-A-2 of Justice Kennedy's opinion] because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers* * * *."). Thus, Justice Scalia's view that legislative motive should not be considered recognizes a narrower Free Exercise right than Justices Kennedy and Stevens envisioned, *i.e.*, a regime in which evidence of invidious motive would not invalidate a law that was otherwise neutral and generally applicable. And far from faulting the lead opinion for insufficiently separating the "neutrality" and "general applicability" requirements, Justice Scalia emphasized that

neither term is "to be found within the First Amendment itself" but are used to describe a law that limits religiously motivated conduct but "nonetheless [does] not * * * constitute a 'law * * * prohibiting the free exercise' of religion within the meaning of the First Amendment." *Id.* at 557. For Justice Scalia, neutrality and general applicability were "not only 'interrelated,'" as the lead opinion wrote, but "substantially overlap." *Ibid.*

Here, the Seventh Circuit disclaimed any motive requirement and relied on precisely the considerations Justice Scalia urged should be considered in determining whether a measure is neutral and generally applicable, namely, whether the law "*by [its] terms* impose[s] disabilities on the basis of religion" and whether it, while "neutral in [its] terms, through [its] design, construction, or enforcement target[s] the practices of a particular religion for discriminatory treatment." 508 U.S. at 557. Thus, the Seventh Circuit, after finding facial neutrality, looked to whether "there was a more subtle or masked hostility to religion." Pet. App. 34a. See also *ibid.* (cautioning against "selective use of statements in legislative history"). This approach cannot fairly be described as failing to follow *Lukumi* or heed Justice Scalia's views.

Equally ill-conceived is petitioners' accusation that the Seventh Circuit "distort[ed] the neutrality and general-applicability inquiries" by improperly "import[ing]" the government's interest into the determination whether a law is neutral and generally applicable. Pet. 29. *Lukumi* could hardly be clearer that a court deciding a Free Exercise claim must consider the governmental interest in just the way the Seventh Circuit did here. Hialeah lost *Lukumi*

because it failed to pursue its legitimate objectives in an evenhanded way. Thus, despite recognizing that an "adverse impact will not always lead to a finding of impermissible targeting" (508 U.S. at 535), the Court held the "principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs" (*id.* at 524). For example, "many * * * secular killings fall[ing] within the city's interest in preventing the cruel treatment of animals" went unpunished, while the Santeria "religion alone * * * [bore] the burden of the ordinances." *Id.* at 544. What petitioners decry as a distortion of *Lukumi* is one of that decision's central precepts: that "unequal treatment" becomes suspect when those similarly situated relative to the government's legitimate interests are treated dissimilarly. See *id.* at 542-43 (Free Exercise concern triggered "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation").

Here, by contrast, as the Seventh Circuit recognized, there is no claim, nor could there be, that the OMA is underinclusive with respect to the concededly legitimate objective of expanding O'Hare. Petitioners identify no owner of property, religious or secular, whose property is equally necessary to the airport modernization but who was nevertheless permitted to retain state-law rights that risk interference with the project. Instead, petitioners' claim of targeting is based on differential treatment of those who are outside the project area and therefore not similarly situated. Of course, the IRFRA amendment does not extend to religiously owned properties outside the project area—that

would not advance the government's interest in removing impediments to modernization of the airport. Petitioners' claim is therefore altogether incompatible with *Lukumi*, as well as *Smith*. The necessary implication of *Lukumi* (and the very holding of *Smith*) is that a law incidentally burdening a particular religious practice, for example, by forbidding the killing of all animals in a geographic area (where certain religious adherents lived or worshiped) or prohibiting the use of a drug (although certain religious adherents used it as a sacrament), is not for that reason subject to strict scrutiny. See *Lukumi*, 508 U.S. at 535-36, 539; *Smith*, 494 U.S. at 882-90. Yet on petitioners' theory, individuals burdened by those laws could have claimed they were "targeted" and "singled out" relative to those who lived and worshiped elsewhere or observed other sacraments. That failed theory—that St. Johannes must, for purposes of assessing petitioners' Free Exercise claim, be classified together with church-owned properties outside the O'Hare project area (see Pet. App. 32a)—explains why petitioners lost this case.

Moreover, although an error in applying *Lukumi* to the particular facts of this case would not be grounds for certiorari in any event, the decision below was unassailably correct. As even petitioners recognize, IRFRA was amended "because the religious cemeteries supposedly interfered with Chicago's desire to expand O'Hare" (Pet. 3), "not out of religious hostility" (*id.* at 14).[13] They also recognize that the

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[13] Petitioners improperly qualify the interference as "supposed." The FAA's determination that St. Johannes cannot be accommodated without compromising the delay-reduction and capacity-increasing ALP is final. See *Bensenville*, 457 F.3d at

law of which section 96 is a part—the OMA—was enacted for reasons unrelated to its effect on religious practice. See *id.* at 7 (OMA "re-wrote more than a dozen laws to remove legal obstacles to O'Hare's expansion"). Under *Lukumi*, the IRFRA amendment must be examined as a part of that entire statute. See 508 U.S. at 540 (treating ordinances "as a group for neutrality purposes" and declining to "decide whether Ordinance 87-72 could survive constitutional scrutiny if it existed separately"). The Seventh Circuit did just that. See Pet. App. 34a-35a. That court recognized, moreover, that the specific impetus for the OMA was a state-court decision having nothing to do with religion-based claims, but rather a case brought by the municipal plaintiffs below in which Chicago was enjoined from proceeding from land acquisition for alleged noncompliance with Illinois Aeronautics Act. See *id.* at 7a-8a (citing *Philip v. Daley*, 790 N.E.2d 961 (Ill. App. Ct. 2003)). Finally, the statute, in both its policy and its operative provisions, made clear that the General Assembly was singlemindedly bent on eliminating legal obstacles of whatever kind to the OMP. See *id.* at 8a, 35a.

Nor have petitioners ever challenged another provision of the same statute, section 15, which grants Chicago the power, "notwithstanding any law to the contrary," to "acquire" "any" property, public or private, "for purposes related to the [OMP]," by "condemnation or otherwise," including "any property used for cemetery purposes within or outside of the City, and to require that the cemetery be removed to a different location." OMA § 15. No doubt this

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73 (dismissing petition for review). That precludes the claim that it was possible to "shift[] one runway 350 feet" (Pet. 11-12 n.3), as well as other alternatives.

omission reflects that even petitioners understand section 15 is a quintessentially neutral law of general applicability and, for that reason, valid under *Smith* and *Lukumi*. Petitioners are therefore left to suggest that a fundamentally different Free Exercise result should have obtained because the OMA, in addition to including this neutral, comprehensive provision, as well as numerous other specific amendments to various state statutes, also includes a provision specifically amending IRFRA to limit their IRFRA rights, but not those of others. This argument has no merit.

The inclusion of OMA section 96 (like the other similar statutory amendments) is almost certainly an artifact of Illinois law—which requires that "[a] bill expressly amending a law shall set forth completely the sections amended." Ill. Const. art. 4, § 8(d). Moreover, given section 15, it is unimaginable how section 96 could have independent Free Exercise Clause significance, let alone trigger a presumption of unconstitutionality. And, petitioners' incessant claim that they were singled out notwithstanding, even section 96 does not, either on its face or application, apply to petitioners alone. Rather, it extinguishes a state-law ground for an objection under IRFRA to "relocation of cemeteries," in the plural. While St. Johannes is "now the only cemetery" (Pet. App. 35a) directly affected by the IRFRA amendment, the OMA provision, as the court recognized, applies by its terms to any religious cemetery in the project area—"[i]f there were ten cemeteries in * * * [the acquisition area, it] would apply to all ten * * *" (*id.* at 36a)—as it would, presumably, to a religious individual who made a similar claim about a cemetery in the project area that had no religious affiliation.

Petitioners' hypothetical—involving an arbitrary exemption of religious groups in a particular area from the benefit of a state law requiring heightened scrutiny for religion, apparently for its own sake, not to serve any nondiscriminatory policy or as part of a larger statute (see Pet. 29)—bears no resemblance to this case. The OMA is not aimed at and does not affect only religious adherents. Nor is it capricious; the line it draws reflects the obvious fact that only some land is adjacent to O'Hare and needed for the OMP. The OMA reaches no more broadly than necessary to serve its purpose, and nothing in the federal Constitution required the General Assembly to repeal IRFRA in its entirety in order to exempt the land needed for O'Hare expansion.

An apt analogy to this case would be a law imposing, in a limited area of Richmond, a cap of 100 feet on the height of buildings (perhaps to enable planes to more safely approach a new runway), applicable to hundreds of apartment and office buildings but also inhibiting a church's planned construction of a 120-foot steeple. The notion that such a neutral law of general applicability should be subject to strict scrutiny under the Free Exercise Clause, simply because it burdens the church in relation to congregations outside the flight path, is wholly contrary to *Smith*.[14]

Finally, although the Seventh Circuit did not—and did not need to—rely on *Locke*, petitioners' attempt to

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[14] Moreover, while petitioners are unable to obtain strict scrutiny of the cemetery relocation, their hypothetical ignores that they retain all other rights under IRFRA, even in the project area. Similarly, as the Seventh Circuit noted, the OMA did not disturb IRFRA rights of those in other parts of the state who embrace similar tenets. See Pet. App. 36a.

brush aside that case is startling. Petitioners' response to *Locke*'s refusal to invalidate an education funding restriction "unless it (1) burdens religious practice or (2) is the product of bad motive" is to assert that "Section 30 concededly imposes a substantial burden on religious practice." Pet. 27 n.5. But Chicago has never conceded such a thing. See Brief of Defendant-Appellee City of Chicago, No. 05-4418, at 45-50 (on-line version). Nor did the Seventh Circuit find a substantial burden. While it "accept[ed]" that relocation of the cemetery was a "'sacrilege to [petitioners'] religious faith'" (Pet. App. 31a-32a), it did not identify any religious practice, much less any substantial burden on religious practice. Any claim of burden, moreover, is inconsistent with *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-55 (1988) (government action making land unavailable for religious practices and offending religious beliefs does not violate Free Exercise Clause).

More important, while relocation of the cemetery was the heart of petitioners' RLUIPA claim, their Free Exercise claim—the only claim they press in this Court—did not challenge the construction of the OMP or the cemetery relocation it entails. It challenged Chicago's role in the enactment of the OMA, including section 96's partial repeal of IRFRA. It is an exceedingly odd notion that Chicago burdened religion by urging the General Assembly to enact a law, especially one that merely "restore[d] Illinois law to the regime governed by *Smith*." Pet. App. 36a. But even if Chicago could be held responsible for the IRFRA amendment, it is hard to say that it imposes any burden, let alone a substantial one. As we explain above, OMA section 15 itself, which petitioners have never challenged,

grants Chicago the power to condemn and relocate any property used for cemetery purposes—meaning that section 96 imposes no independent burden at all.

III. THIS CASE PRESENTS AN EXTRAORDINARILY POOR VEHICLE FOR REVISITING THIS COURT'S FREE EXERCISE JURISPRUDENCE.

To the extent that the federal courts require any further guidance concerning the Free Exercise Clause, granting certiorari here would present no opportunity for this Court to supply it.

1. As we demonstrate above, the motive question petitioners ask the Court to decide is not even presented by this case. Nor does the case raise the issue raised by the First and Ninth Circuit decisions they claim align with the Seventh. That issue, moreover, was considered four Terms ago in *Locke*. Petitioners' bluster notwithstanding, the Seventh Circuit applied the rule of law petitioners seek—that heightened scrutiny would attach if petitioners had identified an actual "selective" burden, without any further showing of animus.

2. No federal court would have decided the question presented here any differently. Certainly no post-*Lukumi* Free Exercise decision comes close to crediting a claim like petitioners': that the decision to apply the OMA to those whose property actually stands in the path of the runway, but not to those in other parts of Illinois, constitutes the kind of targeting that triggers a presumption of unconstitutionality. While the dissenting opinion below reached a contrary result, it rested in part on a rationale that simply disregards the central teaching of *Smith* (see Pet. App. 59a); and even petitioners do not defend it.

3. While petitioners declare that strict scrutiny is "outcome-determinative" in this case (Pet. 3), it is, in fact, immaterial. Despite holding that heightened scrutiny was not required, the Seventh Circuit nonetheless applied it, for the sake of completeness, and held it satisfied. Petitioners' efforts (*id.* at 30-31) to brush aside this conclusion, which occupies six pages of decision (Pet. App. 36a-42a), misses the point. This Court, to be sure, is not "bound" by the dictum of lower courts (Pet. 31)—or their holdings, for that matter—but it absolutely considers whether it is asked to decide an issue unlikely to affect the result. Here, while the Seventh Circuit's strict-scrutiny analysis was dicta when the court pronounced it, if petitioners obtain reversal on the standard of review, the question would be foremost on remand. There is no reason to expect the majority, which ruled strict scrutiny was satisfied and denied a petition for rehearing on this question, would, on a third examination, reach the opposite conclusion.

4. Petitioners' peculiar claim is also so riddled with idiosyncracies that it is exceedingly unlikely that the Court could reach any generally significant constitutional question. Their claim of a burden on religion is at least three times removed from claims typically forwarded under the Free Exercise Clause. Petitioners challenge Chicago's role in advocating enactment of the OMA (Pet. App. 84a), government conduct against which, to our knowledge, no Free Exercise claim has ever been made. Moreover, the law that Chicago allegedly desired (and the General Assembly enacted) does not burden religious exercise, but merely eliminates one defense that petitioners could have interposed against the proposed condemnation—namely that the alleged burden on religion is

not the least restrictive means of achieving a compelling interest. That standard is not required under the Free Exercise Clause for neutral, generally applicable government action like the broad-based OMP land acquisition. Finally, this Court has repeatedly rejected claims like petitioners' objection to relocation of the cemetery, namely that it is a "sacrilege to * * * religious faith." Pet. App. 31a-32a. See, *e.g.*, *Lyng; Bowen v. Roy*, 476 U.S. 693 (1986).

5. Even complete success in this litigation would not likely aid petitioners. On the single Free Exercise claim remaining in this case, the very most petitioners could obtain would be a declaration that OMA section 96 is ineffective to take them out of IRFRA, with the result that they could assert IRFRA to resist condemnation in the case now pending in state court. But any reliance on IRFRA would surely be barred by petitioners' failure to raise such a claim in this case. Under Illinois law, res judicata bars litigation of claims that "arise[] from a single group of operative facts" as prior litigation between the same parties. See, *e.g.*, *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 893 (Ill. 1998). Petitioners brought three claims in this case challenging Chicago's proposed acquisition of the cemetery. Two were directed at the OMA because of its amendment to IRFRA. The third, under RLUIPA, even sought strict scrutiny. Thus, if petitioners regain a claim under IRFRA by invalidating OMA section 96, that claim would challenge the same action they challenged in this case and is therefore precluded.[15] Moreover, petitioners could obtain

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[15] Petitioners had filed a state-court action under IRFRA when Chicago first announced the OMP. Pet. 6. Petitioners write that the "claim was dismissed as moot" (*id.* at 7), but it

actual relief only if the state courts were willing and allowed to overrule the FAA's determination, reached after thousands of hours of expert study, regarding the proper layout for O'Hare's ALP—an issue that is itself res judicata. See *Bensenville*, 457 F.3d at 70-73 (upholding FAA's approval of ALP). While petitioners may contest our reading of state law, there is no reason to think the state court will forgive their attempt to multiply judicial proceedings and profit from their delay by challenging the condemnation under IRFRA at this late date.

6. Petitioners close by assuring the Court that they are not "Luddites" and that their multi-year, multi-jurisdiction litigation campaign against the OMP is not motivated by hostility to O'Hare expansion but merely incidental to sincere religious belief. Pet. 31. Whatever petitioners' motivation, they consistently ignore that the real party in interest on the other side of these proceedings is not Chicago. Rather, Chicago is building the OMP for the millions of travelers whose lives (including their own religious commitments) are disrupted by delays and capacity-restrictions as a result of O'Hare's outmoded present design. Petitioners, raising claims unavailable to hundreds of other property owners affected by the OMP, have been repeatedly heard on their claims that they were "targeted" or "singled out"; this is the third of eight federal appeals, and petitioners or their former co-plaintiffs are also

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was dismissed on their motion (App., *infra*, 24a), and it was not moot at all. The claim was not currently available to petitioners, but success on either of the two claims they leveled at OMA section 96 in this case would have enabled them to pursue an IRFRA claim. At a minimum, therefore, the claim could have and should have been brought in this case.

parties to at least four state-court cases.[16] The instant petition, in which petitioners are able to advance a colorable plea for certiorari only by affirmatively misrepresenting the Seventh Circuit's decision and seriously distorting this Court's precedent, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 11, 2008

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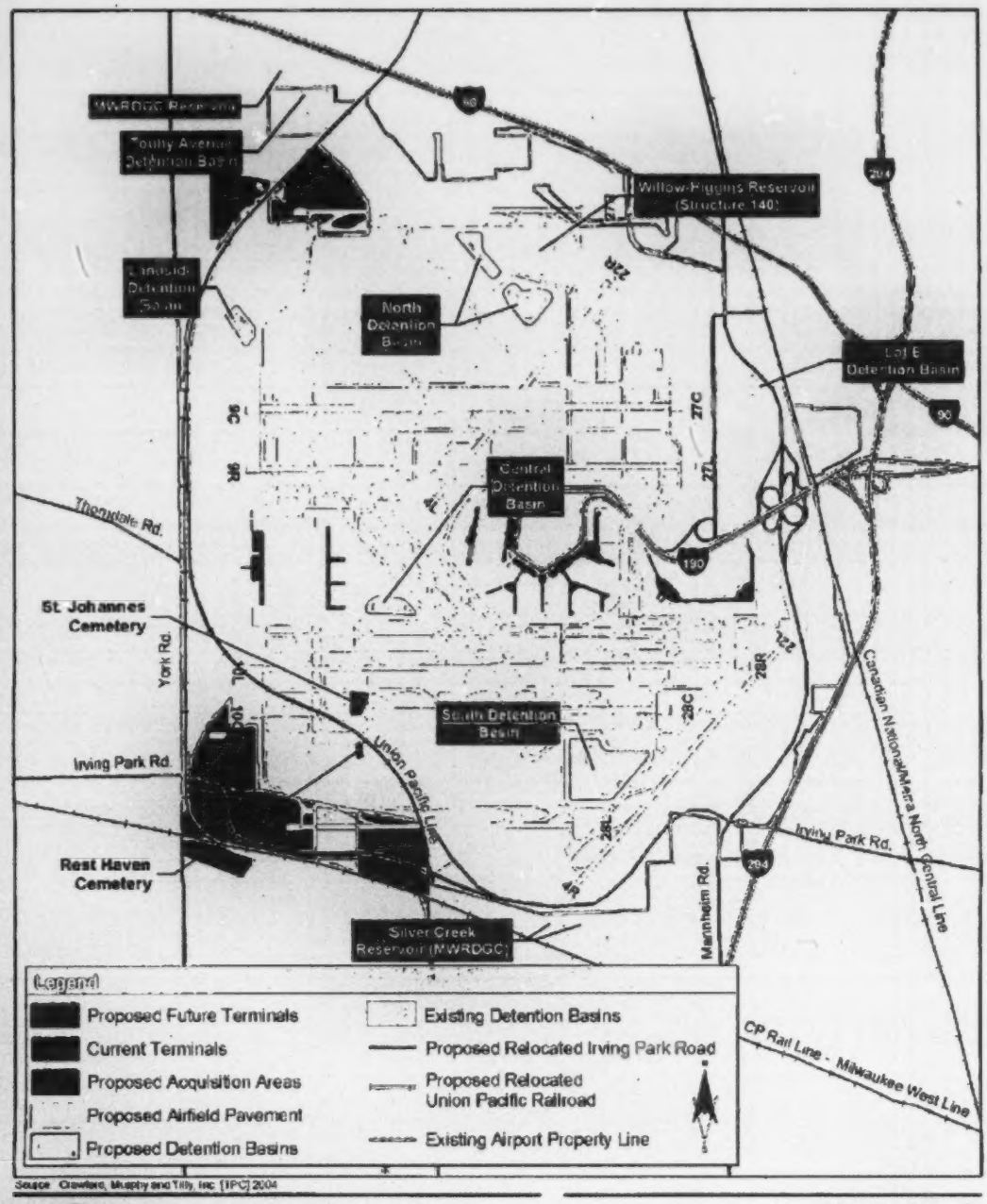
[16] The cemetery is among only 54 pieces of property out of 605 parcels in the acquisition area that Chicago does not already own. Thirty-five of the unacquired properties are either owned by the Village of Bensenville, one of the municipal plaintiffs below, or represented by one of petitioners' counsel. Another 13 are in litigation. Only 6 have not yet received formal offers, as required by state law.

APPENDIX



Source: Crawford, Murphy and Tilly, Inc. (IPC) 2004

Chicago O'Hare International Airport

Alternative C

O'Hare Modernization
Environmental Impact Statement

Exhibit 3-8

APPENDIX B

AN ACT in relations to airports.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Short Title. This Act may be cited as the O'Hare Modernization Act.

Section 5. Findings and purposes.

(a) The Illinois General Assembly finds and determines:

(1) The reliability and efficiency of the State and national air transportation systems significantly depend on the efficiency of the Chicago O'Hare International Airport. O'Hare has an essential role in air transportation for the State of Illinois. The reliability and efficiency of air transportation for residents and businesses in Illinois and other States depend on efficient air traffic operations at O'Hare.

(2) O'Hare cannot efficiently perform its role in the State and national air transportation systems unless it is reconfigured with multiple parallel runways.

(3) The O'Hare Modernization Program will enhance the economic welfare of the State of Illinois and its residents by creating thousands of jobs and business opportunities.

(4) O'Hare provides, and will continue to provide, unique air transportation functions that cannot be replaced by any other airport in Illinois.

(5) Public roadway access through the existing western boundary of O'Hare to passenger termi-

nal and parking facilities located inside the boundary of O'Hare and reasonably accessible to that western access is an essential element of the O'Hare Modernization Program. That western access to O'Hare is needed to realize the full economic opportunities created by the O'Hare Modernization Program and to improve ground transportation in the O'Hare area. It is important to the State that the western access be constructed not later than the time existing runway 14R-32L is removed from service.

(6) For the reasons stated in paragraphs (1), (2), (3), (4), and (5), it is essential that the O'Hare Modernization Program be completed efficiently and without unnecessary delay.

(7) For the reasons stated in paragraphs (1), (2), (3), (4), and (5), it is essential that acquisition of property as required for the O'Hare Modernization Program be completed as expeditiously as practicable.

(8) The General Assembly recognizes that the planning, construction, and use of O'Hare and the planning, construction, and use of the O'Hare Modernization Program will be subject to intensive regulatory scrutiny by the United States and that no purpose would be served by duplicative or redundant regulation of the safety and impacts of the airport or the O'Hare Modernization Program.

(9) The General Assembly recognizes that the City of Chicago has enacted and successfully implemented ordinances that combat past and ongoing discrimination against minorities and women in the market that competes for contracts

with the City of Chicago. These ordinances are among the strongest and most successful in the country, and have made significant progress in combatting discrimination against minorities and women throughout northeastern Illinois.

(b) It is the intent of the General Assembly that all agencies of this State and its subdivisions shall facilitate the efficient and expeditious completion of the O'Hare Modernization Program to the extent not specifically prohibited by law, and that legal impediments to the completion of the project be eliminated.

Section 10. Definitions. As used in this Act:

"Airport property" means (i) any property or an interest in property that is, or hereafter becomes, part of O'Hare International Airport and (ii) any property or an interest in property that is not part of O'Hare International Airport, but that is acquired by the City of Chicago for purposes of air navigation or air safety in accordance with standards established by the Federal Aviation Administration. "Airport property", however, shall not include any substitute property acquired pursuant to Section 15 of this Act, including property acquired for cemetery purposes.

"O'Hare Modernization Program" means the plan for modernization of O'Hare International Airport by (1) construction and reconfiguration of runways, taxiways, and facilities for movement and servicing of aircraft; construction of western airport access and related roadways; construction and reconfiguration of roadways, terminals, passenger transportation facilities, parking facilities, and cargo facilities; construction of drainage and stormwater management facilities; and related projects, within the area bounded on the north, between Carmen Drive and

the Union Pacific/Canadian Pacific Railroad, by Old Higgins Road, and between Old Higgins Road and Touhy Avenue, by the Union Pacific/Canadian Pacific Railroad, and east of the Union Pacific/Canadian Pacific Railroad by the northern boundary of O'Hare existing on January 1, 2003; on the east by the eastern boundary of O'Hare existing on January 1, 2003; on the southeast by the southeastern boundary of O'Hare existing on January 1, 2003; on the south between the eastern boundary of O'Hare and the Union Pacific Railroad by the southern boundary of O'Hare existing on January 1, 2003; on the south, between the Union Pacific Railroad and the east boundary of York Road by the Canadian Pacific railroad yard; on the west, between the Canadian Pacific Railroad Yard and the railroad spur intersecting York Road between Arthur and Pratt Avenues, by the east boundary of York Road; and on the northwest, between York Road and the Union Pacific/Canadian Pacific Railroad, by the railroad spur, and between the railroad spur and the point at which the extended eastern boundary of Carmen Drive intersects the Union Pacific/Canadian Pacific Railroad, by the Union Pacific/Canadian Pacific Railroad, and between the Union Pacific/Canadian Pacific Railroad and Old Higgins Road, by the extended eastern boundary of Carmen Drive and by Carmen Drive; and (2) provision for air navigation and air safety outside that area in accordance with standards established by the Federal Aviation Administration.

"O'Hare" means Chicago O'Hare International Airport. "City" means the City of Chicago.

Section 15. Acquisition of property. In addition to any other powers the City may have, and notwithstanding any other law to the contrary, the City may

acquire by gift, grant, lease, purchase, condemnation (including condemnation by quick take under Section 7-103.149 of the Code of Civil Procedure), or otherwise any right, title, or interest in any private property, property held in the name of or belonging to any public body or unit of government, or any property devoted to a public use, or any other rights or easements, including any property, rights, or easements owned by the State, units of local government, or school districts, including forest preserve districts, for purposes related to the O'Hare Modernization Program. The powers given to the City under this Section include the power to acquire, by condemnation or otherwise, any property used for cemetery purposes within or outside of the City, and to require that the cemetery be removed to a different location. The powers given to the City under this Section include the power to condemn or otherwise acquire (other than by condemnation by quick take under Section 7-103 of the Code of Civil Procedure), and to convey, substitute property when the City reasonably determines that monetary compensation will not be sufficient or practical just compensation for property acquired by the City in connection with the O'Hare Modernization Program. The acquisition of substitute property is declared to be for public use. Property acquired under this Section includes property that the City reasonably determines will be necessary for future use, regardless of whether final regulatory or funding decisions have been made; provided, however, that quick-take of such property is subject to Section 7-103.149 of the Code of Civil Procedure.

Section 20. Condemnation by other governmental units. No airport property may be subject to taking by condemnation or otherwise by any unit of local government other than the City of Chicago, or by any

agency, instrumentality, or political subdivision of the State.

Section 21. Reimbursement for tax base losses.

(a) Whenever the City acquires parcels of property within any school district or community college district for the O'Hare Modernization Program, the City shall, for the following taxable year and for each of the 5 taxable years thereafter, pay to that district the amount of the total property tax liability of the acquired parcels to the district for the 2002 taxable year, increased or decreased each year by the percentage change of the district's total tax extension for the current taxable year from the total tax extension for the prior taxable year; provided that no annual increase shall exceed the lesser of 5% or the annual increase in the Consumer Price Index. Funds payable by the City under this Section shall be paid exclusively from non-tax revenues generated at airports owned by the City, and shall not exceed the amount of those funds that can be paid for that purpose under 49 U.S.C. 47107(1)(2).

(b) Notwithstanding any other provision of this Section: (i) no funds shall be payable by the City under this Section with respect to any taxable year succeeding the 2009 taxable year; (ii) in no event shall such funds be payable on or after January 1, 2010; (iii) in no event shall the total funds paid by the City pursuant to this Section to all districts for all taxable years exceed $20,000,000; and (iv) any amounts payable to a district by the City with respect to any parcel of property for any taxable year shall be reduced by the amount of taxes actually paid to the district for that taxable year with respect to that parcel or any leasehold interest therein.

(c) Whenever the City acquires property that is subject to this Section, the City shall notify the assessor of the county in which the property is located. The assessor or the clerk of that county shall, on an annual basis, notify the affected school district or community college district of all property that has been identified as being subject to this Section, and shall provide the district and the City with such information as may be required in determining the amounts payable by the City under this Section. The City shall make payments as required by this Section no later than 90 days after that information is received and verified by the City.

(d) As used in this Section, "Consumer Price Index" means the Consumer Price Index for All Urban Consumers for all items published by the United States Department of Labor.

Section 25. Jurisdiction over airport property. Airport property shall not be subject to the the laws of any unit of local government except as provided by ordinance of the City. Plans of all public agencies that may affect the O'Hare Modernization Program shall be consistent with the O'Hare Modernization Program, and to the extent that any plan of any public agency or unit or division of State or local government is inconsistent with the O'Hare Modernization Program, that plan is and shall be void and of no effect.

Section 27. Minority and women-owned businesses and workers. All City contracts for the O'Hare Modernization Program shall be subject to all applicable ordinances of the City governing contracting with minority and women-owned businesses and prohibiting discrimination and requiring appropriate affirmative action with respect to minority and women

participants in the work force, including but not limited to Section 2-92-330 of the Municipal Code of the City of Chicago (relating to hiring of Chicago residents), Section 2-92-390 of the Municipal Code of the City of Chicago (relating to hiring of women and minorities), and Sections 2-92-420 through 2-92-570 of the Municipal Code of the City of Chicago (relating to contracting with minority-owned and women-owned business enterprises), to the extent permitted by law and federal funding restrictions. The City of Chicago shall file semi-annual reports with the General Assembly documenting compliance with such ordinances with respect to work performed as part of the O'Hare Modernization Program and disclosing the extent to which that work is performed by minority and women workers and minority-owned and women-owned business enterprises.

Section 28. Advisory Committee. An O'Hare Modernization Advisory Committee is established to monitor, review, and report the utilization of minority owned business enterprises and women owned business enterprises, as defined in Section 2-92-420 in the Municipal Code of the City of Chicago, the employment of women, and the employment of minorities, as defined in Section 2-92-420 of the Municipal Code of the City of Chicago, during the O'Hare Modernization project. The City of Chicago shall work with the Advisory Committee in accumulating necessary information for the Committee to submit reports, as necessary, to the General Assembly and the City of Chicago. The Committee shall consist of 13 members: 7 members selected by the Mayor of the City of Chicago; 2 members selected by the President of the Illinois Senate; 2 members selected by the Speaker of the Illinois House of Representatives; one member selected by the Minor-

ity Leader of the Illinois Senate; and one member selected by the Minority Leader of the Illinois House of Representatives.

The Advisory Committee shall meet periodically and shall report the information gathered to the Mayor of the City of Chicago and to the General Assembly by December 31st of every year.

Section 30. Home Rule. It is declared to be the law of this State, pursuant to paragraph (h) of Section 6 of Article VII of the Illinois Constitution, that the regulation and supervision of the City of Chicago's implementation of the O'Hare Modernization Program is an exclusive State function that may not be exercised concurrently by any unit of local government.

Section 90. The Archeological and Paleontological Resources Protection Act is amended by adding Section 1.5 as follows:

(20 ILCS 3435/1.5 new)

Sec.1.5. O'Hare Modernization. Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act or requires that City, or any person acting on behalf of that City, to obtain a permit under this Act when acquiring property or otherwise exercising its powers under the O'Hare Modernization Act.

Section 91. The Human Skeletal Remains Protection Act is amended by adding Section 4.5 as follows:

(20 ILCS 3440/4.5 new)

Sec.4.5. O'Hare Modernization. Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Mod-

ernization Act or requires that City, or any person acting on behalf of that City, to obtain a permit under this Act when acquiring property or otherwise exercising its powers under the O'Hare Modernization Act.

Section 92. The Illinois Municipal Code is amended by changing Sections 11-51-1, 11-102-2, and 11-102-4 as follows:

(65 ILCS 5/11-51-1) (from Ch. 24, par. 11-51-1)

Sec. 11-51-1. *Cemetery removal.* Whenever any cemetery is embraced within the limits of any city, village, or incorporated town, the corporate authorities thereof, if, in their opinion, any good cause exists why such cemetery should be removed, may cause the remains of all persons interred therein to be removed to some other suitable place. However, the corporate authorities shall first obtain the assent of the trustees or other persons having the control or ownership of such cemetery, or a majority thereof. When such cemetery is owned by one or more private parties, or private corporation or chartered society, the corporate authorities of such city may require the removal of such cemetery to be done at the expense of such private parties, or private corporation or chartered society, if such removal be based upon their application. *Nothing in this Section limits the powers of the City of Chicago to acquire property or otherwise exercise its powers under Section 15 of the O'Hare Modernization Act.*

(Source: P.A. 87-1153.)

(65 ILCS 5/11-102-2) (from Ch. 24, par. 11-102-2)

Sec. 11-102-2. Every municipality specified in Section 11-102-1 may purchase, construct, reconstruct, expand and improve landing fields, landing strips, landing floats, hangers, terminal buildings and other structures relating thereto and may provide terminal facilities for public airports; may construct, reconstruct and improve causeways, roadways, and bridges for approaches to or connections with the landing fields, landing strips and landing floats; and may construct and maintain breakwaters for the protection of such airports with a water front. Before any work of construction is commenced in, over or upon any public waters of the state, the plans and specifications therefor shall be submitted to and approved by the Department of Transportation of the state. Submission to and approval by the Department of Transportation is not required for any work or construction undertaken as part of the O'Hare Modernization Program as defined in Section 10 of the O'Hare Modernization Act.

(Source: P.A. 81-840.)

(65 ILCS 5/11-102-4) (from Ch. 24, par. 11-102-4)

Sec. 11-102-4. Every municipality specified in Section 11-102-1 may contract for the removal or relocation of all buildings, railways, mains, pipes, conduits, wires, poles, and all other structures, facilities and equipment which may interfere with the location, expansion or improvement of any public airport, or with the safe approach thereto or take-off therefrom by aircraft, and may acquire by gift, grant, lease, purchase, condemnation or otherwise any private property, public property or property devoted to any public use or rights or easements therein for any

purpose authorized by this Section and Sections 11-102-1 through 11-102-3. *Nothing in this Section limits the powers of the City of Chicago to acquire property or otherwise exercise its powers under Section 15 of the O'Hare Modernization Act.*

(Source: Laws 1961, p. 576.)

Section 93. The Downstate Forest Preserve District Act is amended by changing Section 5e as follows:

(70 ILCS 805/5e) (from Ch. 96 1/2, par. 6308e)

Sec. 5e. Property owned by a forest preserve district shall not be subject to eminent domain or condemnation proceedings, *except as otherwise provided in Section15 of the O'Hare Modernization Act.*

(Source: P.A. 85-993.)

Section 93.5. The Vital Records Act is amended by changing Section 21 as follows:

(410 ILCS 535/21) (from Ch. 111 1/2, par. 73-21)

Sec. 21. (1) The funeral director or person acting as such who first assumes custody of a dead body or fetus shall make a written report to the registrar of the district in which death occurred or in which the body or fetus was found within 24 hours after taking custody of the body or fetus on a form prescribed and furnished by the State Registrar and in accordance with the rules promulgated by the State Registrar. Except as specified in paragraph (2) of this Section, the written report shall serve as a permit to transport, bury or entomb the body or fetus within this State, provided that the funeral director or

person acting as such shall certify that the physician in charge of the patient's care for the illness or condition which resulted in death has been contacted and has affirmatively stated that he will sign the medical certificate of death or the fetal death certificate. If a funeral director fails to file written reports under this Section in a timely manner, the local registrar may suspend the funeral director's privilege of filing written reports by mail. In a county with a population greater than 3,000,000, if a funeral director or person acting as such inters or entombs a dead body without having previously certified that the physician in charge of the patient's care for the illness or condition that resulted in death has been contacted and has affirmatively stated that he or she will sign the medical certificate of death, then that funeral director or person acting as such is responsible for payment of the specific costs incurred by the county medical examiner in disinterring and reinterring or reentombing the dead body.

(2) The written report as specified in paragraph (1) of this Section shall not serve as a permit to:

(a) Remove body or fetus from this State;

(b) Cremate the body or fetus; or

(c) Make disposal of any body or fetus in any manner when death is subject to the coroner's or medical examiner's investigation.

(3) In accordance with the provisions of paragraph (2) of this Section the funeral director or person acting as such who first assumes custody of a dead body or fetus shall obtain a permit for

disposition of such dead human body prior to final disposition or removal from the State of the body or fetus. Such permit shall be issued by the registrar of the district where death occurred or the body or fetus was found. No such permit shall be issued until a properly completed certificate of death has been filed with the registrar. The registrar shall insure the issuance of a permit for disposition within an expedited period of time to accommodate Sunday or holiday burials of decedents whose time of death and religious tenets or beliefs necessitate Sunday or holiday burials.

(4) A permit which accompanies a dead body or fetus brought into this State shall be authority for final disposition of the body or fetus in this State, except in municipalities where local ordinance requires the issuance of a local permit prior to disposition.

(5) A permit for disposition of a dead human body shall be required prior to disinterment of a dead body or fetus, and when the disinterred body is to be shipped by a common carrier. Such permit shall be issued to a licensed funeral director or person acting as such, upon proper application, by the local registrar of the district in which disinterment is to be made. In the case of disinterment, proper application shall include a statement providing the name and address of any surviving spouse of the deceased, or, if none, any surviving children of the deceased, or if no surviving spouse or children, a parent, brother, or sister of the deceased. The application shall indicate whether the applicant is one of these parties and, if so, whether the applicant is a

surviving spouse or a surviving child. Prior to the issuance of a permit for disinterment, the local registrar shall, by certified mail, notify the surviving spouse, unless he or she is the applicant, or if there is no surviving spouse, all surviving children except for the applicant, of the application for the permit. The person or persons notified shall have 30 days from the mailing of the notice to object by obtaining an injunction enjoining the issuance of the permit. After the 30-day period has expired, the local registrar shall issue the permit unless he or she has been enjoined from doing so or there are other statutory grounds for refusal. The notice to the spouse or surviving children shall inform the person or persons being notified of the right to seek an injunction within 30 days. Notwithstanding any other provision of this subsection (5), a court may order issuance of a permit for disinterment without notice or prior to the expiration of the 30-day period where the petition is made by an agency of any governmental unit and good cause is shown for disinterment without notice or for the early order. *Nothing in this subsection (5) limits the authority of the City of Chicago to acquire property or otherwise exercise its powers under the O'Hare Modernization Act or requires that City, or any person acting on behalf of that City, to obtain a permit under this subsection (5) when exercising powers under the O'Hare Modernization Act.*

(Source: P.A. 88-261; 89-381, eff. 8-18-95.)

Section 94. The Illinois Aeronautics Act is amended by changing Sections 38.01 and 47 and by adding Section 47.1 as follows:

(620 ILCS 5/38.01) (from Ch. 15 1/2, par. 22.38a) Sec. 38.01. *Project applications.*

(a) No municipality or political subdivision in this state, whether acting alone or jointly with another municipality or political subdivision or with the state, shall submit any project application under the provisions of the Airport and Airway Improvement Act of 1982, or any amendment thereof, unless the project and the project application have been first approved by the Department. No such municipality or political subdivision shall directly accept, receive, or disburse any funds granted by the United States under the Airport and Airway Improvement Act of 1982, but it shall designate the Department as its agent to accept, receive, and disburse such funds, provided, however, nothing in this Section shall be construed to prohibit any municipality or any political subdivision of more than 500,000 inhabitants from disbursing such funds through its corporate authorities. It shall enter into an agreement with the Department prescribing the terms and conditions of such agency in accordance with federal laws, rules and regulations and applicable laws of this state. *This subsection (a) does not apply to any project application submitted in connection with the O'Hare Modernization Program as defined in Section 10 of the O'Hare Modernization Act.*

(b) The City of Chicago may submit a project application under the provisions of the Airport and Airway Improvement Act of 1982, as now or hereafter amended, or any other federal law providing for airport planning or development, if the application is submitted in connection with

the O'Hare Modernization Program as defined in Section 10 of the O'Hare Modernization Act, and the City may directly accept, receive, and disburse any such funds.

(Source: P.A. 92-341, eff. 8-10-01.)

(620 ILCS 5/47) (from Ch. 15 1/2, par. 22.47)

Sec. 47. Operation without certificate of approval unlawful; applications.) An application for a certificate of approval of an airport or restricted landing area, or the alteration or extension thereof, shall set forth, among other things, the location of all railways, mains, pipes, conduits, wires, cables, poles and other facilities and structures of public service corporations or municipal or quasi-municipal corporations, located within the area proposed to be acquired or restricted, and the names of persons owning the same, to the extent that such information can be reasonably ascertained by the applicant.

It shall be unlawful for any municipality or other political subdivision, or officer or employee thereof, or for any person, to make any alteration or extension of an existing airport or restricted landing area, or to use or operate any airport or restricted landing area, for which a certificate of approval has not been issued by the Department; Provided, that no certificate of approval shall be required for an airport or restricted landing area which was in existence and approved by the Illinois Aeronautics Commission, whether or not being operated, on or before July 1, 1945, *or for the O'Hare Modernization Program as defined in Section 10 of the O'Hare Modernization Act; except that a certificate of approval shall be*

required under this Section for construction of a new runway at O'Hare International Airport with a geographical orientation that varies from a geographical east-west orientation by more than 10 degrees, or for construction of a new runway at that airport that would result in more than 8 runways being available for aircraft operations at that airport. The Department shall supervise, monitor, and enforce compliance with the O'Hare Modernization Act by all other departments, agencies, and units of State and local government.

Provisions of this Section do not apply to special purpose aircraft designated as such by the Department when operating to or from uncertificated areas other than their principal base of operations, provided mutually acceptable arrangements are made with the property owner, and provided the owner or operator of the aircraft assumes liabilities which may arise out of such operations.

(Source: P.A. 81-840.)

(620 ILCS 5/47.1 new)

Sec. 47.1. Review by Department of O'Hare Modernization Program. The Department shall monitor the design, planning, financing, and construction of the O'Hare Modernization Program as defined in Section 10 of the O'Hare Modernization Act in order to ensure that the O'Hare Modernization Program proceeds in a timely, efficient, and safe manner, and shall monitor the effects of the O'Hare Modernization Program on units of local government throughout the State. The Department shall file reports with the General Assembly as the Department deems appropriate concerning the design, planning, financing, and construction of the O'Hare Modernization Program as

defined in Section 10 of the O'Hare Modernization Act, and the effects of the O'Hare Modernization Program on units of local government.

Section 95. The Code of Civil Procedure is amended by changing Section 2-103 and adding Section 7-103.149 as follows:

(735 ILCS 5/2-103) (from Ch. 110, par. 2-103)

Sec. 2-103. Public corporations - Local actions - Libel - Insurance companies.

(a) Actions must be brought against a public, municipal, governmental or quasi-municipal corporation in the county in which its principal office is located or in the county in which the transaction or some part thereof occurred out of which the cause of action arose. *Except as otherwise provided in Section 7-102 of this Code, if the cause of action is related to an airport owned by a unit of local government or the property or aircraft operations thereof, however, including an action challenging the constitutionality of this amendatory Act of the 93rd General Assembly, the action must be brought in the county in which the unit of local government's principal office is located.* Actions to recover damage to real estate which may be overflowed or otherwise damaged by reason of any act of the corporation may be brought in the county where the real estate or some part of it is situated, or in the county where the corporation is located, at the option of the party claiming to be injured. *Except as otherwise provided in Section 7-102 of this Code, any cause of action that is related to an airport owned by a unit of local government, and that is pending on or after the effective date of this amendatory Act of the 93rd General Assembly in a county other than the county in which the unit of local government's princi-*

pal office is located, shall be transferred, upon motion of any party under Section 2-106 of this Code, to the county in which the unit of local government's principal office is located.

(b) Any action to quiet title to real estate, or to partition or recover possession thereof or to foreclose a mortgage or other lien thereon, must be brought in the county in which the real estate or some part of it is situated.

(c) Any action which is made local by any statute must be brought in the county designated in the statute.

(d) Every action against any owner, publisher, editor, author or printer of a newspaper or magazine of general circulation for libel contained in that newspaper or magazine may be commenced only in the county in which the defendant resides or has his, her or its principal office or in which the article was composed or printed, except when the defendant resides or the article was printed without this State, in either of which cases the action may be commenced in any county in which the libel was circulated or published.

(e) Actions against any insurance company incorporated under the law of this State or doing business in this State may also be brought in any county in which the plaintiff or one of the plaintiffs may reside.

(Source: P.A. 85-887.)

(735 ILCS 5/7-103.149 new)

Sec. 7-103.149. *Quick-take; O'Hare Modernization Program purposes. Quick-take proceedings under Section 7-103 may be used by the City of Chicago for the purpose of acquiring property within the area*

bounded on the north, between Carmen Drive and the Union Pacific/Canadian Pacific Railroad, by Old Higgins Road, and between Old Higgins Road and Touhy Avenue, by the Union Pacific/Canadian Pacific Railroad, and east of the Union Pacific/Canadian Pacific Railroad by the northern boundary of O'Hare existing on January 1, 2003; on the east by the eastern boundary of O'Hare existing on January 1, 2003; on the southeast by the southeastern boundary of O'Hare existing on January 1, 2003; on the south between the eastern boundary of O'Hare and the Union Pacific Railroad by the southern boundary of O'Hare existing on January 1, 2003; on the south, between the Union Pacific Railroad and the east boundary of York Road by the Canadian Pacific railroad yard; on the west, between the Canadian Pacific Railroad Yard and the railroad spur intersecting York Road between Arthur and Pratt Avenues, by the east boundary of York Road; and on the northwest, between York Road and the Union Pacific/Canadian Pacific Railroad, by the railroad spur, and between the railroad spur and the point at which the extended eastern boundary of Carmen Drive intersects the Union Pacific/Canadian Pacific Railroad, by the Union Pacific/Canadian Pacific Railroad, and between the Union Pacific/Canadian Pacific Railroad and Old Higgins Road, by the extended eastern boundary of Carmen Drive and by Carmen Drive, for the O'Hare Modernization Program as defined in Section 10 of the O'Hare Modernization Act.

Section 96. The Religious Freedom Restoration Act is amended by adding Section 30 as follows:

(775 ILCS 35/30 new)

Sec. 30 O'Hare Modernization. Nothing in this Act limits the authority of the City of Chicago to exercise

its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein.

Section 98. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.

Section 99. Effective date. This Act takes effect upon its becoming law, and Section 95 of this Act applies to cases pending on or after the effective date.

ORDER

2118-N (Rev. 9/99)

STATE OF ILLINOIS — UNITED STATES OF AMERICA — COUNTY OF DU PAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

St. John's United Church of Christ, et al Plaintiffs
vs
the City of Chicago Defendant

Rest Haven Cemetery, et al Plaintiffs
vs
the City of Chicago Defendant

CASE NUMBER
2002 MR 1175
(consolidated with 2003 MR 0016

File Stamp Here

ORDER

This matter coming on to be heard for status and on the Plaintiffs' Motion To Dismiss For Mootness, the Court being fully advised in the premises and having jurisdiction of the subject matter, IT IS ORDERED HEREBY:

that the entitled cases are hereby dismissed, without prejudice on the grounds of Mootness.

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DuPage Attorney No.: 007
Attorney for: Defendant - City of Chicago
Address: 1761 So. Naperville Road
City/State/Zip: Wheaton, IL. 60187
Telephone: (630) 690-1806

ENTER: [signature]
JUDGE

DATE: August 13, 2003

JOEL A. KAGANN, CLERK OF THE 18TH JUDICIAL CIRCUIT COURT ©
WHEATON, ILLINOIS 60189-0707

APPENDIX C

41

FILED
APR 22 2008
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SUPREME COURT, U.S.

No. 07-1127

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, ...,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

No. 07-1127

ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

I. THE CIRCUIT SPLIT IDENTIFIED IN THE PETITION IS REAL AND SUBSTANTIAL.

1. The City of Chicago is wrong to suggest that the sharp conflict between the decision below and those of other circuits is not a conflict at all, but instead the result of a "misread[ing]" of the Seventh Circuit's decision—a misreading apparently made not only by petitioners but by Judge Ripple in dissent as well. *See* Brief in Opposition ("Opp.") at 11. According to the City, there is no circuit split over the question presented—whether a law that singles out one religious group for unfavorable treatment is

nevertheless neutral and generally applicable if it is adopted for nondiscriminatory reasons—because the Seventh Circuit concluded that "petitioners were not singled out" at all. *Id.* *See also id.* at 2, 9, 13.

Not so. Contrary to the City's revisionist view of the decision below, the majority squarely acknowledged that the IRFRA amendment "t[ook] back part of what IRFRA gave," Pet. App. 31a, that it did so only with respect to St. John's, *id.* 36a, that St. John's "is now the only cemetery in the State of Illinois affected by the new § 30 of IRFRA," *id.* 35a-36a, and that "the legislation leaves other religious cemeteries untouched." *Id.* 36a. Moreover, Judge Ripple recognized that "[t]he effect of the amendment is to remove from the protections afforded to every other individual's religious observance, those individuals whose religious practices would be substantially burdened by the relocation of cemeteries in connection with the expansion of O'Hare." Pet. App. 61a (Ripple, J., dissenting). While the majority ultimately disagreed with the dissent over the significance of this differential treatment, it never suggested that Judge Ripple was "misread[ing]" its opinion or mischaracterizing the singular treatment afforded St. John's.

Indeed, what divided the majority and the dissent was not whether St. John's was denied state-sanctioned protections that all other religious groups in Illinois enjoy under IRFRA—of course it was—but whether that differential treatment standing alone warranted strict scrutiny. In conflict with decisions from the Third, Sixth, Tenth, and Eleventh Circuits, the majority held it did not. *See* Pet. 12-18. Instead, the majority ruled that a law that singles out religious groups for less favorable treatment remains

neutral and generally applicable so long as "the legislature had [a] nondiscriminatory purpose" in adopting it. Pet. App. 36a. Thus, contrary to the City's assertions (Opp. 12), the panel majority quite clearly announced a motive requirement that four circuits have rejected and three others have embraced. Pet. 12-22.

It was only to resolve that motive inquiry—whether "the legislature had [a] nondiscriminatory purpose" in adopting the IRFRA amendment—that the majority went on to examine the overall O'Hare Modernization Act ("OMA"). *See* Pet. App. 35a. Based on the omnibus nature of the OMA—a sprawling statute that amended many laws—the majority concluded that "the OMA was designed to remove any and all state-law based impediments to the O'Hare expansion project." Pet. App. 35a. The panel majority therefore concluded that, in adopting the amendment that deprived St. John's of its IRFRA rights, "the legislature had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion"—and therefore strict scrutiny was not triggered. *Id.* 36a.

2. Trying to sow confusion where none exists, the City insists that, in examining the other portions of the OMA, the majority articulated a different ruling entirely: that petitioners were not "treated differently from other similarly situated property owners." Opp. 13. According to the City, because the OMA was an omnibus bill that stripped an array of legal protections from many landowners near O'Hare, there was no differential treatment.

But that, as we have demonstrated, is an incomplete account of the opinion below. The panel majority did address the OMA, but it did so for a

very specific reason: to demonstrate that the legislature lacked anti-religious animus. Pet. App. 34a-36a. That conclusion, in turn, drove the majority's holding that the IRFRA amendment was neutral and generally applicable despite its lack of even-handedness. *Id.* 36a.

The City's gloss on the opinion below—that the panel considered only the OMA and concluded from it that petitioners were not singled out for unique treatment—not only contradicts what the opinion itself says, but would also make no sense. After all, IRFRA is a free-standing statutory entitlement. As the panel acknowledged, IRFRA now extends a benefit to all religious groups in the State except one. Pet. App. 35a-36a. Had IRFRA been enacted at the outset in such a gerrymandered form, it certainly would have violated the neutrality and general applicability commands of *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), and *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). That it assumed its current form through an amendment tacked on to an omnibus bill makes no difference. Indeed, the argument is absurd: Under the City's logic, Congress could enact a law protecting all religious structures except the Cathedral of St. Matthew the Apostle against taxation, so long as it did so in two stages—first exempting all religious structures, and later abrogating the exemption for the Cathedral on some commercial premise buried in broader legislation. The Free Exercise Clause would not tolerate such a statute.

3. Apart from arguing that the Seventh Circuit's opinion means something other than what it actually says, the City is unable to deny the circuit split that

the decision below has exacerbated. Indeed, its "similarly situated" argument is the only "distinction" it offers to "explain[] the supposedly conflicting decisions" from the Third, Sixth, Tenth, and Eleventh Circuits. Opp. 13.

The City's reluctance to join issue is understandable. As we explained in the petition (pp.13-15), the Seventh Circuit's rule squarely conflicts with the Tenth Circuit's decision in *Shrum* v. *City of Coweta*, 449 F.3d 1132 (10th Cir. 2006). As Judge McConnell wrote in *Shrum*, the Free Exercise Clause applies "when government officials interfere[] with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities." *Id.* at 1144-45 (citations omitted). Judge McConnell could have easily added "airport expansion" to this list as well. Yet in stark contrast to the *Shrum* approach, the majority below held that stripping St. John's of a protection afforded every other religious group did not trigger strict scrutiny precisely because the legislature acted "not out of hostility or prejudice, but for secular reasons." *Id.* at 1144. The cases are in direct conflict.

The City's bid to minimize the conflict with the Eleventh Circuit's decision in *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), is equally flawed. Indeed, the City concedes that *Midrash* adopted the "principle * * * [that] [h]eightened scrutiny applies if a government action dissimilarly treats religious claimants and those who are, in relevant respects, similarly situated." Opp. 13. The City's only rejoinder is that in this case, St.

John's was not "similarly situated." *Id.* But this just reprises the same irrelevancy that permeates the City's brief: that "[n]either the OMA itself nor IRFRA after its amendment treats the church differently from any other property owner in the acquisition area or any other secular owner outside the acquisition area." Opp. 9. We do not disagree. The question, though, is whether IRFRA now treats some religious groups differently than other religious groups. And on that score, even the City concedes that petitioners "were treated differently * * * from religiously affiliated landowners elsewhere in the state." Opp. 2. To be sure, the "only" reason for this different treatment was that the other religious groups' "property was not needed for the airport project." *Id.* But while that may indeed show that "Chicago's actions * * * w[ere] based on geography, not religion," Opp. 9, the important question presented is whether that motivation *matters*. Under the Eleventh Circuit's rule in *Midrash*, it would not. The majority below adopted a rule that demonstrably conflicts with that decision. The same holds true for the Third and Sixth Circuits. Certiorari is warranted to resolve this split.

4. The City incorrectly argues that none of the circuits St. John's identified as having aligned with the court below have actually done so. Specifically, the City argues that this Court's opinion in *Locke* v. *Davey*, 540 U.S. 712 (2004), resolved the school-funding issue addressed in *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir. 1999), and *KDM ex rel. WJM* v. *Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999). Opp. 17-18. The City is right that *Locke* articulated a free-exercise inquiry for government-funding cases. We noted as much in the petition.

See Pet. 27 n.5. But the conclusion the City draws—that *Locke* cleared up the rampant confusion about when or whether some showing of animus is required to prove a free-exercise violation—is wrong.

The First Circuit's post-*Locke* opinion in *Eulitt ex rel. Eulitt* v. *Maine*, 386 F.3d 344 (1st Cir. 2004), demonstrates as much. *Eulitt* correctly read *Locke* as limited to free-exercise cases involving government-funding decisions. 386 F.3d at 355. But it also reiterated *Strout*'s holding that *Lukumi* requires a showing of animus in all other free-exercise cases. *Id.* It accordingly rejected Eulitt's free-exercise claim because "[t]here is not a shred of evidence that any comparable animus fueled the enactment of the challenged Maine statute." *Id.* *Eulitt* thus confirms that the First Circuit's *Strout* approach—which the City does not deny conflicts with the decisions of the Tenth, Eleventh, Third, and Sixth Circuits—survives.[1]

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES.

1. When it comes to the conflict between the majority's decision below and this Court's precedents, the City's principal response is to accuse us of again "misreading" cases. The City states, for example, that our "discussion of the *Lukumi* 'jurisprudence' is limited to a concurring opinion," Opp. 10—even though the petition spends four pages

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[1] The City insists that "[o]f all petitioners' citations, only a student note post-dates *Locke*." Opp. 19. That is wrong. Most of the authorities on which St. John's relies were decided after *Locke*, including *Shrum*, *Midrash*, *World Wide Street Preachers Fellowship* v. *Town of Columbia*, 245 Fed. Appx. 336 (5th Cir. 2005), and the article by Professor Laycock. Pet. v, vi, 27 n.5.

discussing the *Lukumi* majority. Pet. 24-27. The City likewise asserts that we "do not even claim a conflict with any decision other than *Lukumi*," Opp. 10—even though the petition devotes more than two pages to analyzing the conflict between the opinion below and the *Smith* holding. Pet. 27-29. And although the City levels several other high-pitched accusations, none merits a response. *See, e.g.*, Opp. 30 (accusing St. John's of "bluster"); *id.* ("seriously distorting this Court's precedent").

2. The City is also wrong on substance. It argues that this Court's decision in *Locke* ameliorates the Seventh Circuit's conflict with *Smith* and *Lukumi*. But as we have noted, *Locke* is about "government's decision not to fund certain religious instruction." Pet. 27 n.5. The Court held that a state may create a scholarship program for college students but refuse to offer the funds to devotional-theology majors. *Locke*, 540 U.S. at 717. The majority, however, was careful to explain that its ruling was peculiar to government funding for religious education. *See id.* at 720-725. This special rule was appropriate because such funding raises unique Establishment Clause concerns: "[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings and professions." *Id.* at 721. *See id.* at 722 ("[W]e can think of few areas in which a State's antiestablishment interests come more into play").

Given these careful limits on *Locke*, it is unsurprising that courts, and most commentators, have understood it to be a *sui generis* "funding case" that does not resolve "[t]he central dispute" in free-

exercise doctrine "about the meaning of 'generally applicable laws.'" Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 216 (2004). The First Circuit said as much in *Eulitt*, 386 F.3d at 354-355, as have other courts. *See Pucket* v. *Hot Springs Sch. Dist. No. 23-2*, 2007 WL 1673887, at *13 (D.S.D. June 6, 2007). Indeed, we are not aware of any court that has applied *Locke* outside the funding context.

To be sure, district courts *have* struggled with *Locke*'s scope at the margins, debating whether it applies to all government-funding cases, or only those involving education funding, or only those involving the funding of religious ministers. *See, e.g., Colorado Christian Univ.* v. *Baker*, 2007 WL 1489801, at *4-*5 (D. Colo. May 18, 2007). And a few commentators have argued that *Locke* goes further, abrogating the *Smith-Lukumi* neutrality principles and requiring government animus in every case. *See* Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause*, Findlaw (Feb. 27, 2004).[2] But this muddle over *Locke*'s scope, far from helping the City, merely confirms the need for this Court's guidance. The Court should grant the petition to resolve the ongoing confusion.

III. THE CITY'S PROCEDURAL OBJECTIONS ARE MERITLESS.

1. The City hypothesizes that if IRFRA were restored to its pre-amendment scope, St. John's could

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[2] *Available at* http://writ.news.findlaw.com/hamilton/20040227.html.

not invoke it because "any reliance on IRFRA would surely be barred by petitioners' failure to raise such a claim in this case." Opp. 32. This argument is bizarre, given that St. John's *did* raise an IRFRA claim when the City first moved to destroy the cemetery. Of course, after the City successfully persuaded the Illinois legislature to repeal IRFRA's protections for St. John's, petitioners moved to dismiss their now-nonexistent IRFRA claim without prejudice on mootness grounds and then filed this suit challenging the IRFRA amendment. Pet. App. 9a. This is not the stuff of res judicata. Under Illinois law, "[r]es judicata should be applied * * * only to facts and conditions as they existed at the time judgment was entered." *In re J'America B.*, 806 N.E.2d 292, 300 (Ill. App. Ct. 2004). Thus "an intervening change in law renders res judicata inapplicable." *Statler* v. *Catalano*, 691 N.E.2d 384, 386 (Ill. App. Ct. 1997). Under this commonsense rule, a party cannot be estopped for refusing to pursue a claim that was repealed by statute.

2. The City maintains that the FAA's Record of Decision is res judicata on the strict-scrutiny question. Opp. 33. This argument too is baseless. The FAA purported to conduct a strict-scrutiny analysis in the context of RFRA, but the D.C. Circuit on appeal held that RFRA did not even apply to the FAA's involvement in the O'Hare project; the court's majority therefore did not reach the merits of the strict-scrutiny question (unlike the dissenting judge, who did reach the merits and found that the FAA failed to satisfy strict scrutiny). *See Village of Bensenville* v. *FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006). That fact dooms the City's preclusion argument, for it is a "general rule" that "if a judgment is appealed,

collateral estoppel only works as to those issues specifically passed upon by the appellate court." *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1168 & n. 6 (5th Cir. 1981) (citing cases); *see Niagara Mohawk Power Corp.* v. *Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996); Restatement (Second) of Judgments § 27, cmt. o. The FAA's unreviewed findings are not preclusive.

3. Finally, the City urges the Court to deny the petition because the panel majority speculated—in what the City concedes was "dicta"—that the City could satisfy strict scrutiny. Opp. 31. According to the City, "even though the Seventh Circuit's strict-scrutiny analysis was dicta * * * [t]here is no reason to expect the majority" on remand would "reach the opposite conclusion." *Id.* But there is. The reason courts do not accord preclusive effect to an alternative holding is because it tends not to be "as carefully or rigorously considered as it would have [been] if it had been necessary to the result." Restatement § 27, cmt. i. Here, that is particularly true, given that (1) St. John's asserted in its amended complaint that there are reasonable ways to facilitate the O'Hare expansion without destroying the cemetery, and (2) the panel majority could not have deemed the O'Hare plan "narrowly tailored" without rejecting that assertion. That rejection flies in the face of the court's duty when reviewing a motion to dismiss to "assume that petitioners' well-pleaded allegations are true." *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 65 n.1 (1990). Speculation over whether the Seventh Circuit on remand may—or may not—find strict scrutiny satisfied should not deter this Court from resolving the important and recurring question presented by the petition.

* * *

The City emphasizes the importance of an efficient O'Hare, and St. John's certainly does not disagree. But the point is for another day. The First Amendment requires that St. John's receive the benefit—the protection of strict scrutiny—that the state of Illinois currently offers to all religious groups but one. "If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones." *Locke*, 540 U.S. at 728 (Scalia, J., dissenting). That principle does not change just because the O'Hare plan might need to be modestly altered to accommodate important free-exercise rights.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,

Petitioners,

v.

CITY OF CHIGAGO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF AMICI CURIAE CIVIL LIBERTIES FOR URBAN BELIEVERS AND THE AMERICAN INDIAN MOVEMENT IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI IN THIS CASE[1]

The American Indian Movement ("AIM") is first a spiritual movement, a religious rebirth, and then the rebirth of dignity and pride in a people. AIM was born out of the dark violence of police brutality and voiceless despair of Indian people in the courts of Minneapolis, Minnesota. From the inside AIM people are cleansing themselves; many have returned to the old traditional religions of their tribes, away from the confused notions of a society that has made them slaves of their own unguided lives. The organization is committed to Indian sovereignty and the security of Indian religious beliefs and practices. AIM has an interest in this litigation because it seeks to protect the rights of Indian peoples to believe and practice their religions. One of AIM's specific concerns is that, like the cemetery involved in this case, Indian burial grounds will be threatened by the Seventh Circuit's ruling. Sovereignty, land, and culture cannot endure if a people is not left in peace.

Civil Liberties for Urban Believers ("CLUB") is an unincorporated association of Illinois Churches. Founded in 1993, its purpose is to fight for the civil rights of Christian believers in the Chicago area and throughout the United States, particularly in the area of land use. CLUB has an interest in this

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[1] All parties have consented to the submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

litigation because it seeks to protect the rights of Christian Churches and believers from laws that burden their religious beliefs and practices. One of CLUB's specific concerns is that various urban properties of its churches will be threatened by the Seventh Circuit's ruling, as targeting of religious practices by hostile local governments may increase.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision will lead to a wide variety of unintended consequences that will unnecessarily trample the Free Exercise Clause. The court below held that before Plaintiffs can obtain relief from a government regulation that substantially burdened their religious exercise, they have to prove that the government acted with the actual *motive* to suppress their religious beliefs and practices.

Requiring proof of an illicit motive in free exercise cases, however, is not the law. If those whose religious actions were substantially burdened were required to prove the actual motive of the government before obtaining relief, then the Free Exercise Clause would be effectively gutted. State actors, in the pursuit of a valid secular end, could trample religious beliefs with impunity.

Religious liberty is our first freedom and deserves the highest form of protection. One of the ways this Court has protected religious exercise is to require the state – when it has enacted a non-neutral, non-generally applicable law – to prove that it has a compelling interest for the law, and that such law is narrowly tailored. Requiring a plaintiff to first prove an illicit motive, however, would relegate this protection meaningless.

No one would contest that the state can pursue legitimate, needed repairs to an international airport. This is not the issue in this case. Rather, the issue is the methodology the lower courts used in

concluding that a church's religious beliefs and practices can be trampled by the state. The Seventh Circuit erred in requiring Plaintiffs to prove an illicit motive on the part of the government actors, and certiorari should be granted to correct this error.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Would Gut Our First Freedom – Religious Liberty.

In 2003, the Illinois Legislature amended the Illinois Religious Freedom Act ("IRFRA" or "Act") to specifically exclude cemeteries and gravesites that stood in the way of the expansion of the Chicago O'Hare Airport. *See* 775 ILCS 35/30 (the "Amendment"). As the dissent correctly noted, this Amendment was neither neutral nor generally applicable. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 644-54 (7th Cir. 2007) (Ripple, dissenting). The fact that the Amendment was placed in the IRFRA is proof enough that its intent was to target religious cemeteries. *See id.* Indeed, the Amendment was specifically enacted to strip religious cemeteries near the O'Hare Airport (of which there is only one now being threatened – the St. Johannes cemetery) of their legal protections under the IRFRA. *See id.* at 633-34.

Nevertheless, the Seventh Circuit upheld the Amendment. After recognizing that the destruction of the St. Johannes cemetery would be a sacrilege to the Plaintiffs, and after recognizing that the St. Johannes cemetery is the only cemetery currently affected by the Amendment, the court concluded that

the Plaintiffs failed to prove a critical point – that "the object of the [O'Hare Modernization Act] was 'to infringe upon or restrict practices because of their religious motivation.'" *Id.* at 632 (quoting *Lukumi*, 508 U.S. at 533).

However, this Court has never required a person whose religious beliefs and practices have been substantially burdened by a law that is not neutral nor generally applicable to prove actual motive. If this were the case, then most, if not all, of the religious beliefs and practices that have already been protected by this Court could be in jeopardy. The religious beliefs of minority religions could be subjected to oppressive state regulations. In short, requiring plaintiffs to prove the actual motive of state actors before obtaining relief from a law that substantially burdens their religious beliefs and practices would gut our first freedom – religious liberty.

The following is just a short list of some of the consequences that could result if the Seventh Circuit's decision were allowed to stand:

A. Tax Exemptions for Churches Could be Threatened.

If the Seventh Circuit's decision were allowed to stand, nothing would prohibit states or counties from removing a worship center's tax exemption. For example, suppose a Muslim mosque was near a blighted area of the city – an area where the state wanted to encourage economic growth and economic activity. And suppose there was only one religious

assembly near this area – a Muslim mosque. Illinois could amend the IRFRA to state, "Nothing in this Act limits the authority of municipalities to remove the property tax exemption of buildings near areas that the city has designated as economic growth areas." If such an amendment were passed, a city could strip the Muslim mosque of its tax exemption just because it was near an area where the city wanted to spur economic activity.[2]

To highlight the problem with requiring a plaintiff to prove a motive hostile to religion before he can bring a free exercise claim, consider the result if the city actually acted with a secret hostile religious motive. Still, the plaintiff would have the burden of proving the city acted with a motive hostile to religion. It would not be enough that the plaintiff proved that the law was neither neutral nor generally applicable.

B. Food Pantries and Soup Kitchens

If the Seventh Circuit's decision were allowed to stand, food pantries and other religious/charitable activities of churches could be threatened. For example, suppose that in Champaign, Illinois, the restaurant industry was struggling. In order to promote the restaurant industry, the city placed restrictions on all food distributions within the city without a proper license. One of the "food distributors" is the Salvation Army that operates a

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[2]In the same way, a law could exempt all parking lots from property taxation except those churches located in residential areas if the city argued that its motivation was to limit parking areas in residential areas, not to suppress religion.

soup kitchen and gives away food. Illinois could amend the IRFRA to state, "Nothing in this Act limits the authority of the City of Champaign to license or regulate the public distribution of free food within Champaign, Illinois." The law would be constitutionally permissible, even though the obvious target of the law was the Salvation Army, the only religious provider of food services in the city, because its objective was secular – to promote the economic viability of the restaurant industry.

C. Worship Centers

Worship Centers could come under attack if the Seventh Circuit's decision is allowed to stand. Zoning officials would be allowed to discriminate against religious organizations as long as they were pursuing a secular motive.[3]

But even more intrusive, the government could put itself in the worship service itself in the name of national security. For example, suppose the government believed that a particular church had a reputation for having international connections, including those from the Middle East. Illinois could pass an amendment saying, "Nothing in this Act limits the authority of law enforcement personnel to place cameras in certain buildings where there is reason to believe that such organizations have had connections with Middle Eastern countries or terrorist connections."

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[3] The fact that the Religious Land Use and Institutionalized Person's Act, 42 U.S.C. § 2000cc *et seq.*, might offer protections to the church is not relevant to whether the Free Exercise clause also should independently protect churches from discriminatory laws.

D. The Amish's Belief

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court protected the Amish religious belief to not send their children to school after the eighth grade. The Amish believed "that their children's attendance in high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but ... also endanger their own salvation and that of their children." *Id.* at 209.

Under the Seventh Circuit's rationale, the religious beliefs of the Amish could be regulated by the state. As long the state was not acting with the *motive* of infringing the Amish's religious beliefs, the state could require all children under the age of 18 to attend public or private school. For example, Illinois could pass an amendment to the IRFRA stating, "Nothing in this Act limits the authority of the City of Chicago to exercise its general police powers under its education laws to require compulsory attendance of all Illinois residents under the age of 18." Such amendment would be obviously targeting the Amish, just like section 30 of the ILRFRA targeted the St. Johannes' cemetery. Yet under the Seventh Circuit's rationale, such a law would be constitutional as long as the state was acting pursuant to a secular motive (such as an educated citizenry), and not a motive to restrict religious beliefs.

E. The Church of the Lukumi Babalu's Religious Beliefs

In *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993), the Court protected a church's practice of animal sacrifice by striking down a city ordinance that banned the ritual slaughter of animals. Under the Seventh Circuit's holding, however, the City of Hialeah could once again ban the ritual slaughter of animals, as long as they acted with a secular objective.

The key to the Court's holding in *Lukumi* was that the law in question was not neutral or generally applicable, but rather, seemed to target the Lukumi's religious beliefs. *See id.* at 535. Under the Seventh Circuit's holding, the religious practices of the Lukumi church could be restricted as long as the City was not acting with the purpose of restricting ritualistic animal slaughter. So, for example, the following exception to the IRFRA would be permissible – "Nothing in this Act limits the authority of municipalities to exercise its general police powers to encourage the preservation of animals for food." Such an amendment would be serving a laudable goal – preservation of edible food. It would be constitutional even if it prohibited a church from engaging in animal sacrifice; a religious practice that the Supreme Court said "has ancient roots." *Id.* at 524.

These are just a few of the many examples of how religious exercise could be burdened if plaintiffs were forced to prove an illicit motive by a state actor to succeed on a free exercise claim. But this Court

has never required proof of actual motive before it extends constitutional protections to religious beliefs. Once a plaintiff has proved that a particular law is not neutral or generally applicable, and burdens his religious beliefs, the law is unconstitutional unless it passes strict scrutiny review. Our first freedom deserves no less protection.

CONCLUSION

Amici respectfully request that this Court grant certiorari.

Respectfully submitted,

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